86-1346 (1)

Supreme Court, U.S.
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Cause No. _____

In the
Supreme Court of the United States
October Term, 1986

ROBERT MATCHA AND ANNE MORGAN MATCHA

Petitioners,

-v.-

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS

Respondent

Petition for a Writ of Certiorari
To The Court Of Appeals
For The Third Supreme Judicial District Of Texas
Sitting In Austin, Texas

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February 16,1987

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QUESTIONS PRESENTED FOR REVIEW

The State of Texas enacted the Texas Open Beaches Act, codifying the means and manner by which the public's easement over certain portions of the beaches of the State was to be determined. Outside of that act, and based upon a purported common law right, an easement was created over the land owned by Petitioners which required that they remove their house, remove sand dunes and vegetation, and hold their land open for public use as a beach.

I.

Whether the State of Texas can avoid the implications of a constitutional taking by characterizing its action below as the adjudication of private property rights?

II.

Whether the imposition of a "common law" public easement by the State of Texas over the property of Petitioners constitutes a taking as defined by the Fifth Amendment of the United States Constitution?

LIST OF NAMES OF PARTIES

The parties to the proceedings below were the Petitioners, obert L. Matcha and Anne Morgan Matcha, and the Respondent, n Mattox, Attorney General of the State of Texas on Behalf of e People of the State of Texas.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	i
Opinions Below	6
Jurisdiction	6
Statute Involved	6
Statement of the Nature of the Case	9
Reasons for Granting the Writ	12
Conclusion	21
Certificate of Service	22
Appendix	
A. Final Judgment and Order of Injunction	A-1
B. Judgment of the Court of Appeals, Third Supreme Judicial District of Texas, at Austin	A-7
C. Opinion of the Court of Appeals, Third Supreme Judicial District of Texas, at Austin	A-8
D. Order overruling application for Writ of Error	A-18
E. Plaintiff's First Amended Petition	A-19

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Brooks v. Jones, 578 S.W.2d 669 (Tex 1979)..... 16

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) 14

City of Houston v. Scanlon, 37 S.W.2d 17 (Tex. 1931)..... 16

Colorado v. Bertine. 107 S.Ct. 738 (1987) 16

Deltona Corp. v. United States, 657 F.2d 1184 (U.S. Ct. Claims 1981), cert. denied, 445 U.S. 1017 (1982)..... 18

Dortch v. Sherman County, 212 S.W.2d 1018 (Tex. Civ. App. - Amarillo 1948)..... 16

Echols v. Wells, 510 S.W.2d 916 (Tex. 1974)..... 13

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922) 18

Feinman v. The State of Texas, 717 S.W.2d 106 (Tex. App. - Houston [1st] 1986)..... 15, 16

Glenn v. Prestorod, 456 S.W. 2d 901 (Tex. 1970)..... 13

Griffin v. Maryland, 378 U.S. 130 (1964)..... 14

Harpold v Moss, 101 Tex. 540. 109 S.W.2d 928 (1908) 13

Henderson v. Travelers Ins. Co., 544 S.W.2d 649 (Tex. 1976)..... 13

Chicago Rock Island and Pacific Ry. v. United States, 284 U.S. 80, 96 (1931) 18

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, (1981) 19

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 14

Kaiser Aetna v. United States, 444 U.S. 164 (1979)..... 19

*Kindred v. Con-Kin, Inc.,*650 S.W.2d 61 (Tex. 1983) ... 13

Kirby Forest Industries v. United States, 104 S. Ct. 2187 (1984) 18

Miracle v. Hines, 247 S.W.2d 611 (Tex. Civ. App. - Ft. Worth 1952)..... 16

Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. - Corpus Christi 1979)..... 15

O'Conner v. Gragg, 339 S.W.2d 878 (Tex. 1960) 16

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978)..... 18

Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952) 14

Rocha v. Campos, 574 S.W.2d 233 (Tex. Civ. App. - Corpus Christi 1978)..... 16

Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984) 18

Seaway Company v. Attorney General of Texas, 375 S.W.2d 923 (Tex. Civ. App. - 1964, writ refused n.r.e.)..... 13, 15

Stark v. Morgan, 602 S.W.2d 298 (Tex. Civ. App. - Dallas 1980, writ refused n.r.e.) 16

T.E.I.A. v. Page, 553 S.W.2d 98 (Tex. 1977)..... 13

Villa Nova Resort, Inc. v. The State of Texas, 711 S.W.2d 120 (Tex. App. - Corpus Christi 1986) 15

Viscardi v. Pajestka, 576 S.W.2d 16 (Tex. 1978) 16

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October Term, 1986

Robert Matcha and Ann Morgan Matcha
Petitioners,

v.

Jim Mattox, Attorney General of Texas,
On Behalf of the People of Texas
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS SITTING IN AUSTIN, TEXAS

The Petitioners Robert Matcha and Anne Morgan Matcha respectfully pray that a writ of certiorari issue to review the Judgment and opinion of the Court of Appeals for the Third Supreme Judicial District of the State of Texas, sitting in Austin, Texas, rendered on May 21, 1986, and from which the Supreme Court of Texas denied writ of error on November 19, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Supreme Judicial District of Texas is reported at 711 S.W.2d 95 (Tex. App. - Austin 1986, writ refused n.r.e.). The Judgment of this Court was rendered on May 21, 1986. A Motion for rehearing was filed and overruled. An Application for Writ of Error was timely filed in the Supreme Court of Texas. The order of the Supreme Court of Texas denying the application for writ of error on November 19, 1986, is reprinted in the appendix hereto, p. A-18, infra.

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to the provisions of 28 U.S.C.A., sec. 1257.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

That portion of the Fifth Amendment to the United States Constitution, which reads as follows:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

That portion of the Fourteenth Amendment of the United States Constitution, which reads as follows:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Those portions of the Texas Natural Resources Code, sec. 61.001, et. seq. as follows:

Sec. 61.001(5).

"Public beach" means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial as recognized in law and custom.

Sec. 61.013.
Prohibition of Obstruction

(b) For purposes of this section, "public beach" shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public since time immemorial as recognized by law or custom . . .

Sec. 61.016.
Boundaries for Areas With No Marked Vegetation Line

(a) To determine the elevation reached by the highest waves of the Gulf of Mexico, in any area in which there is no clearly marked vegetation line (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.

(b) The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side.

(c) If the elevation of the two points on each side of the area are not the same, the extension defining the line reached by the highest waves of the Gulf shall be the

average elevation as between the two points, but if there is no clearly marked line of vegetation, the extended line shall not extend inland further than 200 feet from the seaward line of mean low tide.

Sec. 61.017.
Line of Vegetation Unaffected by Certain Conditions

(a) The "line of vegetation" is not affected by the occasional sprigs of salt grass on mounds and dunes or seaward from them and by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area.

(b) If the changes listed in subsection (a) of this section are made and the vegetation line is obliterated or is created artificially, the line of vegetation shall be determined in the same manner as in those areas covered by Section 61.016 of this Code, but if there is a vegetation line consistently following a line of more than 200 feet from the seaward line of mean low tide, the 200 foot line shall constitute the landward boundary of the area subject to public easement until a final court adjudication establishes the line in another place.

Sec. 61.018.
Suit to Remove Obstructions

(a) The Attorney General or any County Attorney, District Attorney, or Criminal District Attorney shall file in a district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restrict the right of the public, individually or collectively, to free and unrestric ed ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.

STATEMENT OF THE NATURE OF THE CASE

The State of Texas filed a suit against Petitioners pursuat to the provisions of Tex.Nat.Res.Code Ann., sec. 61.001 et seq. (hereinafter referred to as the Texas Open Beaches Act) purportedly to adjudicate the State of Texas's right to an easement across the land owned by the Matchas.

The Matchas owned a lot in the Sea Isle subdivision on Galveston Island, Galveston, Texas. Prior to and after August 18, 1983, a house owned by the Matchas stood on this land. The house was surrounded by a fence. On August 18,1983, hurricane Alicia made landfall on Galveston Island and caused damage to the home owned by the Matchas. Additionally, the hurricane did a substantial amount of damage to the natural ecology of Galveston Island, a barrier island.

Following the hurricane, the Matchas began repairing their home. The State of Texas posted notice that the Matchas were in violation of the law and that they should cease the repairs. When the Matchas continued to repair their house, the State of Texas sought and obtained a temporary injunction prohibiting the Matchas from completing the repairs on their house or planting any vegetation to aid the regeneration of the beach following the huricane.

The State of Texas claimed that as a result of the temporary disruption of the dunes and vegetation on West Beach in Galveston, Texas, caused by hurricane Alicia, the State of Texas immediately acquired an easement over the property of the Matchas, in that the *"visible"* line of vegetation,[1] was, following the hurricane, behind their house. The State contended that their suit was brought under the Texas Open Beaches Act to remove the Matchas' property as an obstruction on the public beach. See appendix, page 1, infra.

The Petitioners' contended that the creation of an easement on a public beach was governed by the provisions of Tex. Nat. Res.

[1] This line, in most cases constitutes the statutory boundary of the public easement over the beach. Tex. Nat. Res. Code, Ann., Sec. 61.001(5).

Code Ann., sec. 61.001 et seq. and was not the adjudication of private property rights. The enactment of the Texas Open Beaches Act created a statutory means for the determination of the public's easement over the beaches of the entire State of Texas. If, in fact, the State of Texas did have an easement over the Matchas land as a result of the acts of the hurricane, then the imposition of that easement constituted a taking as defined by the Fifth Amendment of the United States Constitution, as made applicable to the states by the Fourteenth Amendment.

The action was tried to a jury. During the course of the proceedings, the State of Texas stipulated that Matcha had received no compensation for the easement over the land. The State's expert witness, Dr. Robert Morton, testified that the natural line of vegetation had, as a result of Hurricane Alicia,moved landward of the Matcha property approximately 150-200 feet. He stated that this phenomenon had occurred after other hurricanes and that the line of vegetation "inevitably" moved seaward as the beach recovered from the hurricane. He could not state how long the recovery process would take or where the eventual permanent vegetation line would locate. He did state that in all other respects, the various beach landmarks had recovered to their pre-Alicia location by the time of trial including the sandy beach most used by the public.[2] Other witnesses testified about their activity on the open beach in front of the line of vegetation; none could testify, however, about activities conducted on the Matchas' property or on property exposed as a result of Alicia

At the conclusion of the evidence the Trial Court instructed a verdict for the State of Texas despite the fact that numerous witnesses had testified to the location of the public's easement in a manner other than contended by the State of Texas.[3]

[2] This is the portion of the beach that the citizens who testified during the trial considered to be the public beach, or the open beach used by the public.

[3] Under Texas procedure, where a Motion for Instructed Verdict has been filed by one of the parties, the Trial Court must accept as true all evidence in favor of the adverse party which supports the adverse party's contention. If a fact issue is raised, the Motion should not be granted. *Jasper-Newton Elec. Coop, Inc. v. Martin,* 647 S.W.2d 59 (Tex. App. - Beaumont 1983, writ refused n.r.e.). All facts must then be construed by the Appellate Courts in favor of the losing party. See cases cited infra.

Further, during the course of the trial, several witnesses testified that the location of the State's easement, as defined by the provisions of the Open Beached Act[4] in cases of vegetation line obliteration, was fifty feet seaward of the Matchas' surveyed property line.

The Trial Court then entered a Judgment requiring the Matchas to remove their house, to remove the dunes and vegetation growing on the land, and to allow the public the right of access across the land. By this Judgment the Trial Court effected an all but complete taking of the economic value of the property owned by the Matchas in that they are deprived of all beneficial use of the property.

The question of the taking without compensation was presented in the Trial Court at the time of the stipulation as to no compensation made by the State of Texas. This question was again presented to the Court of Appeals for the Third Supreme Judicial District of Texas as points of error in the brief of the Appellants. The question was raised in the application for rehearing before the Court of Appeals. The Court of Appeals declined to address the issue in its opinion or on rehearing. The issue was again raised by points of error in the Appellants' Application for Writ of Error to the Supreme Court of Texas.

[4] Sec. 61016

REASONS FOR GRANTING THE WRIT
BRIEF OF THE ARGUMENT

This petition presents two constitutional issues, one of which is a constantly recurring and substantial question of constitutional significance. See, e.q., *Colorado v. Bertine.* 107 S.Ct. 738 (1987). The first issue is whether the State of Texas can avoid the Fifth Amendment just compensation requirement altogether by factiously characterizing its action against Petitioners as one in the nature of an adjudicaton of private rights. The second, a consistently recurring constitutional problem, is whether the action of the State of Texas constitutes a taking within the meaning of the Fifth Amendment.

While it is certainly clear that this Court has on many accasions addressed the Fifth Amendment taking issue, there is little or no quidance or authority to determine when an action is "state action" for purposes of the Fifth Amendment. If the action below is in the nature of "state action," then it is absolutely clear that there has been a taking and this Court should summarily reverse the Courts below. The attempt by the State of Texas to avoid the restrictions and requirements of the Fifth Amendment by characterizing its action as a private action, will set a model for other jurisdictions to usurp the private property rights of citizens if this issue is not addressed by the Court.

This case places squarely before the Court the balance between the public and private interests of beach development. The case contains questions of major importance for all states with coastal beach areas. As the competition between development of the beaches and barrier islands and preservation of the enviroment increases, the issues addresseed herein are likely, and in all probability, will need to be addressed by other states,and the federal government. If the states are allowed to engage in regulatory actions in the manner of the State of Texas, then private property rights in coastal areas will no longer exist.

I.

Can the State of Texas avoid the implications of a constitutional taking by characterizing its action below as the adjudication of private property rights?

This Court should grant Petitioners' application for certionari on the first issue in order to determine whether the actions of the State of Texas in imposing an easement over the land of the Petitioners constituted state action within the meaning of the Fifth Amendment.

At the outset, it should be noted that under Texas law, the facts presented during the trial of a cause of action, where an instructed verdict has been granted, must be construed in a light most favorable to the Petitioners. *Henderson v. Travelers Ins. Co.*, 544 S.W.2d 649 (Tex. 1976); *Harpold v. Moss*, 101 Tex. 540, 109 S.W.2d 928 (1908); *Echols v. Wells*, 510 S.W.2d 916 (Tex. 1974); *Kindred v. Con-Kin, Inc.* 650 S.W.2d 61 (Tex. 1983); *T.E.I.A. v. Page*, 553 S.W.2d 98 (Tex. 1977); *Glenn v. Prestorod*, 456 S.W.2d 901 (Tex. 1970).

The Court of Appeals summarily disposed of Petitioners' Costitutional claim by holding that the public had acquired its easement not by virtue of the Open Beaches Act, but by custom. It is Petitioner's contention that the State of Texas cannot ignore the requirements of the Fifth Amendment by characterizing its action as the establishment and adjudicatin of public rights.

In the first case construing the Open Beaches Act, *Seaway Co. v. Attorney General of Texas*, 375 S.W.2d 923 (Tex.Civ. App.-Houston [1st] 1964, writ ref'd n.r.e.) the Texas Court stated that it was unnecessary to address the constitutional taking issue because the Attorney General had only relied upon the Open Beaches Act for his authority to bring the suit on behalf of the people of Texas. The court reasoned that, rather than use the definitions of "beach" and "line of vegetation" provided by the Act, the State was merely seeking to enforce rights long held by the public over the open beach. Since *Seaway*, Texas Courts have never addressed the constitutional implications of the Open Beaches Act.

Petitioners contend that the approach adopted by the State of Texas is constitutionally untenable for two reasons:

1. It allows States to destroy the value of privately held property without regard to the restrictions of the Fifth and Fourteenth Amendments; and

2. Under the facts of the case at bar, it represents an unmitigated fiction in that there was absolutely no testimony by any individual of the public's use of Petitioners' property presented during the trial.

In cases construing the "state action" requirement of 42 U.S.C., sec. 1983, "the question whether particular conduct is private' on the one hand, or state action,' on the other, frequently admits of no easy answer." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In such cases, the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 351. The issue is whether the government action is so intrusive of the private activity as to become its alter ego. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Court found the necessary state action for purposes of 42 U.S.C., sec. 1983, where the defendant leased space to a private restaurant which refused service to blacks. This Court held that the State had so far insinuated itself into a position of interdependence with the private entity that it became a joint participant of the business. In *Jackson v. Metropolitan Edison Co. supra*, this Court rejected the State action claim of an electric utility customer because the utility had merely exercised an option allowed by state law; the initiative to make the decision to terminate the customer's utilities had come from the company, not the state. 419 U.S. at 357. State action has been found where a state employee enforced private property rights. *Griffin v. Maryland*, 378 U.S. 130 (1964).

In the area of First Amendment claims, this Court has found the necessary government action where there was a sufficiently close relationship between the government action and the private entitly as to make it necessary to consider the First Amendment. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952).

Petitioners contend that the cases construing state action for purposed of the Fourteenth Amendment should be applied to the Fifth Amendment taking clause as well.

In all cases construing the Open Beaches Act, there has never been a private party litigant seeking to enforce his private rights to the open beach. All reported suits have been brought in the name of the State of Texas by its elected Attorney General. *Seaway Company v. Attorney General of Texas, 375 S.W.2nd 923 (Tex.Civ. App. - 1964, writ refused n.r.e.); Moody v. White,* 593 S.W.2d 372 (Tex.Civ. App. - Corpus Christi 1979); *Feinman v. The State of Texas,* 717 S.W.2d 106 (Tex.App. - Houston [1st] 1986); *Villa Nova Resort, Inc. v. The State of Texas,* 711 S.W.2d 120 (Tex.App. - Corpus Christi 1986). The Open Beaches Act makes it clear that only the Attorney General, district attorney, or county attorney in the county affected may bring such a suit. Tex.Nat.Res.Code, Ann., Sec. 61.018. [5] In the case at bar, it was the State Attorney General who served notice on Petitioners that their rebuilding efforts violated State law.It was the State Attorney General who sought to enjoin Petitioners' action and who successfully prosecuted the suit. Thus, it is clear that the challenged activity, the imposition of the public easement, is so completely dominated by public authorities in the person of the State Attorney General as to be nothing more than state action.

As to the second issue, the characterization of the action below as one seeking to adjudicate private rights is a fiction. The Court of Appeals upheld the action of the trial court on the basis of the common law of custom and migrating easements. Petitioners never contended that such concepts could not apply in the proper case; Petitioners urge that the facts of the case at bar simply do not support those theories. The State never established that the

[5] An individual may bring a declaratory judgment action against the State of Texas to determine the extent and nature of the public beach and adjudicate rights. *Villa Nova Resort, Inc. v. The State of Texas,* 711 S.W.2d 120 (Tex. App. - Corpus Christi 1986). In such cases, it is the Attorney General who represents the State interest. Individuals in these cases are owners of property adjacent to the beach.

forces giving rise to an easement by custom or a migrating easement ever operated on Petitioners' property.

There was no dedication of the property to the State of Texas. *Viscardi v. Pajestka,* 576 S.W.2d 16 (Tex. 1978); *O'Conner v. Gragg,* 339 S.W.2d 878 (Tex. 1960); *City of Houston v. Scanlon,* 37 S.W.2d 17 (Tex. 1931). There was no prescription. *Brooks v. Jones,* 578 S.W.2d 233 (Tex. 1979); *Stark v. Morgan,* 602 S.W.2d 298 (Tex.Civ.App. - Dallas 1980, writ refused n.r.e.); *Rocha v. Campos, 574 S.W.2d 233 (Tex.Civ.App. - Corpus Christi 1978); Dortch v. Sherman County,* 212 S.W.2d 1018 (Tex.Civ.App. - Amarillo 1948); *Miracle v. Hines, 247 S.W.2d 611 (Tex.Civ.App. - Ft. Worth 1952).* There was no shifting fo an easement already existing in the State of Texas by way of the natural forces which originally gave rise to that easement. *Dortch v. Sherman County, supra.*

The evidence only showed that prior to Hurricane Alicia, the public used the beach area up to the line of vegetation, a line seaward of the Petitioners' property. As a result of Hurricane Alicia, the vegetation line was temporarily relocated at a point landward of the questioned property. None of the witnesses who testified about the customary use of the beach stated that they used Petitioners' property after the Hurricane. In fact, the evidence shows that because of the reconstructed vegetation line and the wreckage of the Petitioner's house, no one used the property at all after the hurricane.

Thus, the only legal basis for the State's claim was the presumption of public use created by the definition of "beach" in the Open Beaches Act. Tex.Nat.Res.Code Ann., Sec. 61.001(5). In a sister case, *Feinman v. The State of Texas, supra.,* the Court held, based on the identical facts, that the State's easement was established pursuant to the rolling easement of the Open Beaches Act.

For these reasons, the Petitioners' contend that their Petition for Writ of Certiorari should be granted. The State of Texas should not be allowed to characterize its actions as private in order to avoid the requirements of the Fifth Amendment.

II.

Does the imposition of a "common law" public easement by the State of Texas over the property of Petitioners constitute a taking as defined by the Fifth Amendment of the United States Constitution?

The question of taking within the dictates of the Fifth Amendment is a constantly recurring problem of major significance. See, e.g., *Colorado v. Bertine,* 107 S.Ct. 738 (1987) The Texas Courts have consistently refused to recognize past decisions of this Court in their interpretations of the Texas Open Beaches Act as it relates to the Petitioners.

The evidence was stipulated by the parties at the trial that no money had been offered by the State of Texas in return for forcing the Matchas to destroy their home in creation of the public beach easement.

As such, the Judgment affirmed by the Court of Appeals allows a taking or more specifically "an application to public use" of the Matcha property within the meaning of the Fifth Amendment of United States Constitution for which the Matchas have received no compensation.

> It is well established as a matter of law that governmental regulation can effect a Fifth Amendment taking. (Citations ommitted) The rationale, as stated by Justice Brennan is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennen, J., Dissenting). While, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," (Citations omitted), the principle generally

> applied is that "if regulation goes too far it will be recognized as a taking." (Litations omitted)

Deltona Corp. v. United States, 657 F.2d 1184 (U.S. Ct. Claims 1981), cert. denied, 445 U.S. 1017 (1982); *Penn Central Transportation Company v. City of New York*, 438 U.S. 1040, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

The Judgment of the Trial Court requiring the removal of the a house, sand dunes, and vegetation was impressed upon the Petitioners' land. See Appendix, A-1, infra. This Judgment is an appendage to the land, and constitutes a "regulatory taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922). Excessive regulation of an individuals' property that has the effect of depriving that individual of the right to use his property, is a taking compensable under the Fifth Amendment. *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984); *Kirby Forest Industries v. United States*, 104 S.Ct. 2187 (1984).

"[C]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago Rock Island and Pacific Ry. v. United States*, 284 U.S. 80, (1931). This issue was discussed at length in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978). In that case, Penn Central was questioning the validity of the historic zoning ordinance which limited the use of Grand Central Station.

> The question presented is whether a city may, as a part of a comprehensive program to preserve historic landmarks and historic districts, place restrictions on the development of individual historic landmarks — in addition to those imposed by applicable zoning ordinances — without effecting a "taking" requiring payment of "just compensation."

In answering the question the Court considered the economic impact of the regulation and the extent to which the regulation interfered with distinct investment-backed expectations. Penn Central had argued that because they could not exploit all of the property interest held, that they should be compensated. This

Court then found that a taking had not occurred in that there were many uses available to Penn Central for the property.

Petitioners have no economically viable use remaining for their property.

> The property has been thus subjected to a non-consensual servitude not borne by any neighboring or similar properties.

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed.2d 631, 98 S.Ct. 2646 (1978); dissenting opinion, J. Rehnquist.

The easement imposed upon the property denies the Matchas the economically viable use of the land. *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, (1981). The judgment at issue restricts the Matchas' use of the land, requires them to tear down the remainder of their residence located on the land and to destroy sand dunes and other artifices on the land. This regulatory activity on the part of the State of Texas constitutes a taking.

The Matchas have no remaining economic value or residual market value in their land due to the Judgment imposing an easement upon it. When property has been rendered unfit for economically viable activity, a Fifth Amendment taking occurs even though the property continues to have a market value. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979). Therein this Court stated:

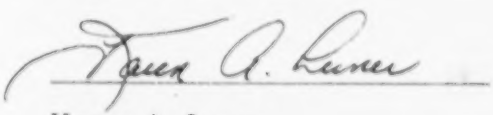
> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interest that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of Petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned property.

Since the creation of an easement constitutes a physical invasion on to the land of the Matchas, and a taking within the meaning of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment, the opinion of the Court of Appeals should be reversed.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Robert Matcha and Ann Morgan Matcha, for the reasons stated, respectfully submit that this application for writ of certiorari should be granted, and that the Supreme Court should reverse the Judgment of the Court of Appeals for the Third Supreme Judicial District of Texas, Austin, Texas, and reverse the Judgment of the Trial Court and render a Judgment for the Appellants.

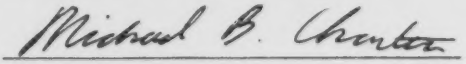
Respectfully submitted,



Karen A. Lerner
Michael B. Charlton
2110 Richmond Avenue
Houston, Texas 77098
(713) 526-1630
Bar No. 12223300

CERTIFICATE OF SERVICE

I, Michael B. Charlton, a member of the Bar of this Court, hereby certify that on this 16th day of February, 1987, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to Ken Cross, Assistant Attorney General, Supreme Court Building, Austin, Texas 78705, counsel for Respondent herein. I further certify that all parties required to be serviced have been serviced.



Michael B. Charlton
Karen A. Lerner
2110 Richmond Avenue
Houston, Texas 77098
(713) 526-1630
Bar No. 12223300

Cause No. _____

In the

Supreme Court of the United States

October Term, 1986

ROBERT MATCHA AND ANNE MORGAN MATCHA

Petitioners,

-v.-

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS

Respondent

APPENDIX TO
Petition for a Writ of Certiorari
To The Court Of Appeals
For The Third Supreme Judicial District Of Texas
Sitting In Austin, Texas

Karen A. Lerner
Michael B. Charlton
2110 Richmond Avenue
Houston, Texas 77098
(713) 526-1630
Bar No. 12223300

Counsel for Petitioners

February 16,1987

NO. 354,178

JIM MATTOX, Attorney General of Texas, on behalf of the People of Texas,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	TRAVIS COUNTY, TEXAS
V.	§	
ROBERT L. MATCHA and wife, ANNE MORGAN MATCHA,	§	
Defendants.	§	250TH JUDICIAL DISTRICT

FINAL JUDGMENT AND ORDER OF INJUNCTION

BE IT REMEMBERED that on September 13-20, 1984, came on to be heard the above-captioned cause, wherein the Attorney General of Texas, acting for and on behalf of the People of Texas, is Plaintiff, and Robert L. Matcha and Anne Morgan Matcha are Defendants.

And came Plaintiff, by and through the Attorney General of Texas, and came the Defendants, in person and by and through their attorneys of record, and all parties announced ready for trial.

Be it further remembered that a jury of twelve good and lawful citizens was duly impaneled and sworn; and came the parties and offered evidence before the Court and jury.

Be it further remembered that the jury and the Court heard the pleadings and the evidence.

At the conclusion of the evidence, and prior to the submission of the case to the jury, three Motions for Instructed Verdict were made by the Defendants, Robert Matcha and Anne Morgan Matcha, which motions were all overruled by the Court.

At the conclusion of the evidence, and prior to the submission of the case to the jury, and on motion of the Plaintiff for instructed verdict, the Court removed the cause of action from the jury and rendered Judgment for the Plaintiff that the Defendants' property and activities complained of in Plaintiff's Second Amended Original Petition on file with the Court were contrary to TEX. NAT. RES. CODE ANN., §61.018, in that Defendants' beach house, sand piles and plantings, are obstructions or barriers which interfere with the free and unrestricted use of the public beach easement and should be removed. Following said action the parties did not require the Court to return the jury and to instruct them to render a verdict. The Court, without objection from the parties, directed the district clerk to discharge the jury.

More specifically, the Court concluded as a matter of law:

(1) That the public has acquired through prescription, dedication, and custom (a right retained by virtue of continuous right in the public since time immemorial) the free and unrestricted right of access to and use and easement over the beach in the vicinity of the Defendant's property, said beach being that area defined at common law and in TEX. NAT. RES. CODE ANN. § §61.001-61.024 as the area bordering on the Gulf of Mexico between the line of mean low tide and the natural line of vegetation, this latter boundary being the extreme seaward boundary of natural vegatation which spreads continuously inland;

(2) That such public right of access, use, and easement follows the beach as the beach moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation;

(3) That the natural line of vegetation in the vicinity of Defendants' property has most recently moved landward under the influence of Hurricane Alicia so that Defendants' land and improvements thereon currently occupy a portion of the beach, as defined at common law and in TEX. NAT. RES. CODE ANN. § §61.001-61.024;

(4) That Defendants engaged in activities to reconstruct a beach house and to place sand piles and plantings of vegeta-

tion seaward of the natural line of vegetation, and accordingly on the beach as defined at common law and in TEX. NAT. RES. CODE. ANN. §§61.001-61.024; and

(5) That such beach house, sand piles, and vegetation plantings constitute obstructions, barriers, restraints, and interferences with the free and unrestricted public right of access to and use of the beach where Defendants' property is situated.

Accordingly, it is ORDERED, ADJUDGED, AND DECREED, that the public has acquired the free and unrestricted right of access, use and easement to and over the beach in the vicinity of Defendants' land, said beach being that area defined at common law and in TEX. NAT. RES. CODE. ANN. §§61.001-61.024 as the area bording on the Gulf of Mexico between the line of mean low tide and the natural line of vegetation. Defendants' land, being "the surface only of the South 70 feet of Lot 60 and a 30' strip adjacent thereto on the South of said Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Map Volume 254-A, page 76, and in the office of the County Clerk of Galveston County, Texas," is subject, and thus servient, to this right of access, use and easement in the public by virtue of the location of Defendants' land within this described beach area. Said right of access, use and easement in the public to the above-described beach area shall always follow the beach as the beach area moves with the natural movements and fluctuations of the line of mean low tide and the natural line of vegetation.

It is further ORDERED, ADJUDGED, and DECREED, pursuant to TEX. NAT. RES. CODE. ANN. §61.081, that Defendants Robert L. Matcha and Anne Morgan Matcha, their agents, servants and employees, shall remove at Defendants' own expense any and all parts of the beach house, sand piles, plantings, or any other obstruction or barrier to the public's use of the beach area defined above and situated on their land. Defendants shall complete such removal by no later han sixty (60) days following the date upon which this judgment and order of injunction becomes final pursuant to law.

It is further ORDERED, ADJUDGED and DECREED that the enforcement of the removal of any and all parts of the beach house, sand piles, or plantings from the above-referenced property is stayed upon the posting with the District Clerk of Travis County, Texas, a bond or other good and sufficient surety, in the total sum of five hundred dollars ($500.00). Said stay shall remain in full force and effect until the exhaustion of all appellate process in this cause, if any. Additionally, public exercise of the beach easement rights decreed above on and over Defendants' property is stayed pending exhaustion of all appellate process in this cause, if any.

It is further ORDERED, ADJUDGED and DECREED that the Order of Temporary Injunction signed by this Court on the 27th day of January, 1984, is hereby dissolved.

It is further ORDERED, ADJUDGED, and DECREED, pursuant to TEX. NAT. RES. CODE. ANN. §61.018, that Defendants Robert L. Matcha and Anne Morgan Matcha, their agents, servants and employees, are hereby enjoined from engaging in any activity, including the construction of any structures and the placement or nourishment of plants, which restrains or interferes with the right of the public, individually or collectively, to free and unrestricted access to and use of the beach area described above.

It is further ORDERED, ADJUDGED, and DECREED that this final judgment shall be a judgment in rem against the land which it affects, namely: The surface only of the South 70 feet of Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Map Volume 254-A, page 76, in the office of theCounty Clerk of Galveston County, Texas.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff have and recover from Defendants all costs of court in this cause, including but not limited to the taxable cost to Plaintiff of taking depositions.

It is further ORDERED, ADJUDGED and DECREED that Plaintiff shall have all writs of injunction and execution and other

process necessary to enforce the terms of this final judgment and order of injunction.

SIGNED this _____ day of _____, 1984.

/s/ Harley Clark

HARLEY CLARK
JUDGE PRESIDING

APPROVED AS TO FORM:

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

BEN F. McDONALD
Group Leader, Energy and Environmental Protection Division

JIM MATTHEWS
Assistant Attorney General
Chief, Environmental Protection Division

/s/ Karen A. Lerner

KAREN A. LERNER
(SBN 12223300)

/s/ Harold F. Harris

HAROLD F. HARRIS
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2715 Bissonnet, Suite 104
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(713) 526-1630

ATTORNEYS FOR DEFENDANTS
ROBERT L. MATCHA AND
ANN MORGAN MATCHA

/s/ Ken Cross

KEN CROSS (SBN05135800)
Assistant Attorney General

/s/ Linda B. Secord

LINDA B. SECORD
(SBN 17973400)
Assistant Attorney General
Environmental Protection Division

P. O. Box 12548
Austin, Texas 78711
(512) 475-1101
TTORNEYS FOR PLAINTIFF

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

JUDGMENT RENDERED MAY 21, 1986

14,384 — ROBERT L. MATCHA, ET UX. V. HONORABLE JIM MATTOX, ATTORNEY GENERAL OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS

APPEAL FROM 250TH DISTRICT COURT OF TRAVIS COUNTY

Before Chief Justice Shannon, Justices Gammage and Carroll

AFFIRMED — Opinion by Chief Justice Shannon

THIS CAUSE came on to be heard on the transcript of the record and same being inspected, because it is the opinion of the Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that appellants, Robert L. Matcha and Anne Morgan Matcha, as principals, and Lawyers Surety Corporation, as surety on the appeal bond herein, pay all costs of this appeal; and that this decision be certified below for observance.

IN THE COURT OF APPEALS,
THIRD SUPREME JUDICIAL DISTRICT OF TEXAS,
AT AUSTIN

NO. 14,384

ROBERT L. MATCHA, ET UX.,
Appellants,

vs.

HONORABLE JIM MATTOX, ATTORNEY GENERAL
OF TEXAS, ON BEHALF OF THE PEOPLE OF TEXAS,
Appellee

FROM THE DISTRICT COURT OF TRAVIS COUNTY,
250TH JUDICIAL DISTRICT NO. 354,178,
HONORABLE HARLEY CLARK, JUDGE

Robert L. Matcha and Anne Morgan Matcha, husband and wife, seek to set aside a judgment of the district court of Travis County in an "open beach" suit. *See* Tex. Nat. Res. Code Ann. § 61.001 *et seq.* (1978 & Supp. 1986). After a jury trial the district court directed a verdict and rendered judgment which, in general, prohibits the Matchas from interfering with the public's right of free access to and over the beach. This Court will affirm the judgment.

The attorney general pleaded that the Matchas own a lot in the Sea Isle subdivision on Galveston Island. Before August 18, 1983, a frame beach house stood on that lot. On that day a violent hurricane nearly destroyed the house — only portions of the

foundation, pilings, floor, and walls of the structure remained. After the storm, the remains of the dwelling were located entirely seaward of the natural line of vegetation on the beach.

After the Matchas commenced reconstruction of the beach house, the attorney general posted notice on the structure that its repair might be in violation of law. Nontheless, the Matchas continued the reconstruction and continued hauling in soil and setting out plants around the house, all such plants being seaward of the natural line of vegetation. The attorney general then obtained restraining and temporary injunctive orders from the district court prohibiting the continuation of repairs.

The attorney general pleaded that the public had acquired rights in the beach area where the Matchas' house, hauled-in-soil and planted vegetation were situated. More specifically, the attorney general asserted that in the beach area between the line of mean low tide and the line of natural vegetation, the public had acquired a right of use or an easement by reason of prescription, dedication, or estoppel, or had retained a right of use and an easement because of continuous right in the public since time immemorial as recognized by law or custom. The attorney general claimed, accordingly, that whatever right the Matchas had to the area was subordinate to the right of lawful use of and access to the area by the general public.

The attorney general pleaded factually that the line of mean low tide and the vegetation line along the beaches of Galveston Island are affected by numerous natural and artificial factors including climate, storm frequency and intensity, local and eustatic sea level conditions, sediment budget, and human activities. Along certain portions of the beach, these effects have been nominal and, as a result, the public beach area has been relatively stationary over the years. However, along other parts of the beach, these effects have been dramatic and, a result, the public beach area has shifted laterally over relatively short periods of time.

The attorney general pleaded, among other things, that the Matchas' reconstruction of their house and their placement of earth and plants about the structure obstructed the common law right of the public to use the beach.

The underlying facts are undisputed. The Matchas own lot sixty in the Sea Isle subdivision on the West Beach of Galveston Island. In 1982, they built a beach house on the lot which was located immediately landward of the natural vegetation line as it existed in the summer of 1982. The powerful hurricane of August 1983 eroded the natural vegetation line landward about one hundred twenty-five to one hundred fifty feet from its prior position. The natural vegetation line was then landward of the Matchas' beach house. After the 1983 hurricane and before trial, the Matchas filled in their lot with earth and planted grass which they tended and cultivated.

In its judgment the district court concluded:

> (1) that the public has acquired through prescription, dedication, and custom (a right retained by virtue of continuous right in the public since time immemorial) the free and unrestricted right of access to and use and easement over the beach in the vicinity of the Matchas' property, said beach being that area defined at common law and in Tex. Nat. Res. Code Ann. § § 61.001-61.024 as the area bordering on the Gulf of Mexico between the line of mean low tide and the natural line of vegetation, this latter boundary being the extreme seaward boundary of natural vegetation which spreads continuously inland;
>
> (2) that such public right of access, use, and easement follows the beach as the beach moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation;
>
> (3) that the natural line of vegetation in the vicinity of the Matchas' property has most recently moved landward of the Matchas' property under the influence of Hurricane Alicia (the August 1983 hurricane) so that the Matchas' land and improvements thereon currently occupy a portion of the beach, as defined at common law and in Tex. Nat. Res. Code Ann. § § 61.001-61.024;
>
> (4) that the Matchas attempted to reconstruct a beach house and to place sand piles and plantings of vegetation seaward of

the natural line of vegetation, and accordingly on the beach as defined at common law and in Tex. Nat. Res. Code Ann. § § 61.001-61.024; and

(5) that such beach house, sand piles, and vegetation plantings constitute obstructions, barriers, restraints, and interferences with the free and unrestricted public right of access to and use of the beach where the Matchas' property is situated.

The judgment declared that the Matchas' property is servient to the public's right of access, use and easement because of the location of the Matchas' land on the public beach. The district court determined that the public had acquired such easement and right of access and use through (1) prescription; (2) dedication; and (3) custom (a right retained by virtue of continuous right in the public since time immemorial). The public's right of access, use and easement to the beach area follows the beach as it moves with the natural movements and fluctuations of the line of mean low tide and the natural line of vegetation.

The judgment ordered the Matchas to remove the beach house, sand piles, plantings, and any other obstructions or barrier to the public's use of the beach area. The district court enjoined the Matchas from engaging in any activity, including the construction of any structures and the placement or nourishment of plants, which restrains or interferes with the right of the public, individually or collectively, to free and unrestricted access to and use of the beach area. Finally, the judgment declared that it was a judgment *in rem* against the land which it affects.

In lengthy briefs, the Matchas attack the district court's judgment and conclusions by twenty-six points of error. By numerous points, the Matchas claim that the district court erred in its preliminary conclusion that the public had acquired a free and restricted easement and right of access to and use of the beach in the vicinity of the Matchas' property. This Court will overrule the points of error and will affirm the judgment upon the basis that the public acquired a right of use or an easement in the vicinity of the Matchas' property by custom.

Custom is an ancient common law doctrine. "If A hath the ripa, or bank, of the port, the king may not grant a liberty to unlade upon the bank, or ripa, without his consent, unless custom had made the liberty thereof free to all, as in many places it is . . . ."City of Galveston v. Menard, 23 Tex. 349, 408 (1859) (Justice Roberts quoting Lord Hale).

Mercer v. Denne, 2 Ch. 538 (1905), involved the custom of fishermen in the parish of Wolmer of drying their fishing nets on the "beach ground." The suit arose when the owner of the beach ground attempted to prevent the fishermen from continuing this longstanding practice. Over the landowner's protestations that the custom made his land useless to him, the court held that the fishermen's net-drying practices had continued since "time immemorial," and had become a legal right which the landowner could not interrupt. The court recognized that, although the beach area had migrated somewhat over the years, "the custom began at the boundary between beach and sea." Hence, the court concluded, ". . . the area for drying would always be adjacent to the boundary for the time being between the beach and the sea." 2 Chancery Division at 579.

Courts in several states have adopted the custom doctrine for determining public rights in beaches. In State ex rel. Thorton v. Hay, 462 P.2d 671 (Or. 1969), the Oregon Supreme Court first discussed dedication and prescription, and concluded that either of those doctrines would justify finding a public right to use privately-owned drybeach areas along the Oregon coast. "We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom." *Id.* at 676. Citing Blackstone, the court then enumerated the elements required to find that a custom exists: the public use must be ancient, peaceable, certain, obligatory, exercised without interruption, and not repugnant with other custom or law. *Id.* at 677. Since the public had freely used the dry-sand area along the Oregon coast for as long as there had been an institutionalized land tenure system in the state, the court concluded that the requirements had been met and the public custom had become a legal right. *Id. See also* City of Daytona

Beach v. Tona-Rama Inc., 294 So.2d 73 (Fla. 1974); State ex rel. Haman v. Fox, 594 P.2d 1093 (Idaho 1979); Application of Ashford, 440 P.2d 76 (Hawaii 1968).

In Texas, the common law, by force of statute, continues in effect until altered or repealed by the Legislature. Tex. Civ. Pract. & Rem. Code § 5.001(1986). The statute makes the common law presumptively applicable unless good reason exists for not applying. "We apply the common law to our conditions when our conditions are similar to those out of which the common law arose, but when the common law is not applicable, because of different conditions, we do not apply it." Motl v. Boyd, 286 S.W. 458, 470 (Tex. 1926).

The doctrine of custom has been acknowledged and approved in at least two Texas opinions, although the appeals in those opinions were disposed of on other grounds. In City of Galveston v. Menard, 23 Tex. 349 (1849), an opinion involving East Beach on Galveston Island, the Supreme Court specifically recognized that rights in the beach area may be acquired by custom. The court concluded, however, that because Galveston had only been settled for twenty years "no immemorial custom, in relation to rights on the coast, had matured into a common law . . . ." 23 Tex. at 394.

The Corpus Christi Court of Civil Appeals in Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979, no writ) affirmed a judgment declaring that the public had free and unrestricted right of ingress and egress to and the right of use and an easement to and over the beach at Mustang Island outside Port Aransas. The judgment was founded upon jury findings of prescription, dedication, and custom. The court stated "(W)e will not discuss the theory of custom other than to say that we recognize the doctrine and that the jury's findings in that regard are supported by sufficient evidence." *Id.* at 379.

No one doubts that proof exists from which the district court could conclude that the public acquired an easement over Galveston's West Beach by custom. As early as 1836, the public used the beach for travel. Dyer, The Early History of Texas, 59

(1916). That use has continued through the years. In Seaway Company v. Attorney General of Texas, 375 S.W.2d 923 (Tex. Civ. App. 1964, writ ref'd n.r.e.) one reads recollections of venerable witnesses about a lifetime of driving, swimming and fishing along the Galveston beach. No one ever asked these persons if they had permission to use the beach and on one ever tried to stop them from that use. These persons just "figured" everyone had the right to use the beach.

By other points, the Matchas attack the district court's conclusion that the public's right of access, use, and easement follows the beach as it moves landward and seaward with the natural movements of the line of mean low tide and the natural line of vegetation. We overrule those points.

The law in this State has recognized migrating property rights in several contexts, most of which involve land near a body of water. The most analogous situation involves the transitory line between state and private property on the beachfront. It is established that the line of mean high tide marks the boundary between private beachfront property and the state's submerged property. Furthermore, this boundary line may move landward or seaward as the beach moves, and the property lines move accordingly. State v. Balli, 190 S.W.2d 71 (Tex. 1944), City of Corpus Christi v. Davis, 622 S.W.2d 640 (Tex. App. 1981, writ ref'd n.r.e.). (If the sea encroached and the upland owner lost his land, he had no redress; if alluvion formed adjoining the seashore, the latter receded with the tide line, and . . . any new alluvion which formed above the tide line should become a part of the contiguous upland estate.)

Although an easement is generally a static real property concept, several Texas opinions have recognized that easements bordering on a body of water may be moved by the water's action. In Moody v. White, *supra*, the court recognized the migratory nature of the public beach easement:

> On one boundary the public beach is determined by the line of mean low tide, while the landward side is marked by the line of vegetation. Although these boundaries do tend to shift occasionally, they can be determined at any given point in time.

> The rule has been established that easements may shift from time to time, just as navigable rivers may change course by avulsion.
>
> 593 S.W.2d at 379.

The court in *Moody* referred to earlier riverbed avulsion opinions, and applied the rule from those opinions to the analogous beachfront erosion situation. Our courts have had more experience with riverfront easements, and the rule is well-established that erosion and accretion along a river can move property lines. In Nonken v. Bexar County, 221 S.W.2d 370 (Tex. Civ. App. 1949, writ ref'd n.r.e.), the court upheld a roadway easement over a creek even though the roadway had shifted some 35 feet over the years due to rains and washouts along the creek bottom.

Indeed, the theory of a migratory public easement is compatible with the doctrine of custom and the situations that often give rise to a custom. A public easement on a beach cannot have been established with reference to a set of static lines on the beach, since the beach itself, and hence the public use of it, surely fluctuated landward and seaward over time. The public easement, if it is to reflect the reality of the public's actual use of the beach, must migrate as did the customary use from which it arose. The law cannot freeze such an easement at one place any more than the law can freeze the beach itself. Custom is, after all, a reflection in law of a long-standing public practice, and therefore the legal result should mirror the factual reality as closely as possible.

Applying static real property concepts in this appeal would produce completely unworkable results if the beach continues to move. An easement fixed in place while the beach moves would result in the easement being either under water or left high and dry inland, detached from the shore. Such easement, meant to preserve the public right to use and enjoy the beach, would then cease functioning for that purpose. Because of these factors and because legal title shifts with the natural movements of the beach, State v. Balli, *supra*; City of Corpus Christi v. Davis, *supra*, this Court has concluded that the public easement also shifts with the natural movements of the beach.

By several points of error, the Matchas argue that two judgments in former litigation determined the location of the vegetation line near their lot and determined further that the vegetation line had not moved in two hundred years. Accordingly, the Matchas suggest those judgments bar relitigation of the location of the vegetation line. One such judgment is that of the district court in Seaway v. Attorney General of Texas, *supra.* The other judgment is a district court judgment from which no appeal was taken, which is referred to in the briefs as John Hill, Attorney General of Texas v. West Beach Encroachment, et al. The Matchas' ill-defined *res judicata* argument fails for at least two reasons.

First, the West Beach Encroachment judgment, which the Matchas claim conclusively adjudicated the location of the vegetation line, is not of record in this appeal. This judgment was not admitted into evidence, and the Matchas have not complained on appeal of its exclusion.

Second, the vegetation line is not a static line which can be conclusively located and adjudicated for all time. Under the doctrine of changed circumstances, unstable or changeable matters like a vegetation line cannot be finally adjudicated, but are always open to relitigation. Franklin v. Rainey, 556 S.W.2d 583 (Tex. Civ. App. 1977, no writ). In *Franklin*, a suit between the same parties twenty years previously had resulted in a judgment determining that Franklin had diverted the natural water course and flooded Rainey's land. In a subsequent suit, involving the same issues, Rainey's successor asserted that the prior suit was *res judicata* and precluded the present suit. The Dallas Court of Civil Appeals disagreed:

> The judgment is res judicata only of present and not of future conditions. Here, during the more than twenty years that have elapsed since the judgment in the prior action, the ditch has been obstructed through neglect, and the levee has deteriorated so as not to operate effectively, thus changing again the flow of surgace water and creating new conditions. Because the flow of the water has substantially changed since that judgment was rendered, we hold that there is a lack of subject

> matter indentity for the prior judgment to be res judicata of this suit. Although there may be similarity of subject matter . . ., it does not follow that the prior judgment is res judicata to the present case because of facts occurring in the intervening years which may alter the rights of the parties.
>
> 556 S.W.2d at 585.

By four points of error, the Matchas attack Tex. Nat. Res. Code § 61.013 as having been enacted into law by a bill which contained an unconstitutional caption and as authorizing a taking without just compensation. The points of error are overruled.

Section 61.013 provides for civil penalties varying from $50 to $1000 for obstructing the beach. An examination of the judgment shows that the district court imposed no civil penalties upon the Matchas. The district court further concluded in the judgment that the public acquired the complained-of-easement not by virtue of the Open Beaches Act, but instead through prescription, dedication, and custom. This Court has affirmed the district court's judgment declaring the easement upon the basis of custom.

The judgment is affirmed.

/s/ Bob Shannon

Bob Shannon, Chief Justice

(Before Chief Justice Shannon, Justices Gammage and Carroll)

Affirmed

Filed: May 21, 1986

SUPREME COURT OF TEXAS
P.O.Box 12248
Supreme Court Building
Austin, Texas 78711

Mary M. Wakefield, Clerk

November 19, 1986

Ms. Karen A. Lerner
2715 Bissonnet
Suite 104
Houston, TX 77005

Mr. Ken Cross
Office of the Attorney General
P.O. Box 12548 Capitol Station
Austin, TX 78711

RE: Case No. C-5563

STYLE: ROBERT L. MATCHA ET UX.
v. HONORABLE JIM MATTOX, ATTORNEY GENERAL OF TEXAS

Dear Counsel:

The application for writ of error in the above-styled case was this day refused, no reversible error.

Chief Justice Hill not sitting.

Respectfully yours,

Mary M. Wakefield, Clerk

By */s/ Blanca E. Morin*
Deputy

NO. 354,178

JIM MATTOX, Attorney General of Texas, on behalf of the People of Texas,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	TRAVIS COUNTY, TEXAS
V.	§	
ROBERT L. MATCHA and wife, ANNE MORGAN MATCHA,	§	
Defendants.	§	250TH JUDICIAL DISTRICT

PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Jim Mattox, Attorney General of the State of Texas, on behalf of the people of Texas ("plaintiff"), and files this First Amended Original Petition. For cause of action plaintiff would respectfully show the Court the following:

I.

Nature

This suit is brought by plaintiff on behalf of the people of the State of Texas pursuant to the authority and duty conferred by Sections 61.001-61.024, TEX. NAT. RES. CODE, commonly known as the "Texas Open Beaches Act." This suit is brought to protect the right of the people to the public beach area, which is is that area extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico where the public has acquired a right of use or easement by prescription, dedication, estoppel, law, or custom. More particularly, this suit has

been brought for temporary injunctive relief, and permanent injunctive relief to remove an obstruction on the public beach area and to prohibit any restraint or interference with the right of public use and access in the public beach area.

II.

Parties

Plaintiff, Jim Mattox, Attorney General of Texas, brings this action on behalf of the people of the State of Texas pursuant to specific statutory authorization, namely §61.018, TEX. NAT. RES. CODE.

Defendants, Robert L. Matcha and wife, Anne Morgan Matcha are residents of Harris County, Texas. They have been served with process and have appeared in this action by written answer.

III.

Jurisdiction and Venue

This Court has jurisdiction of this proceeding pursuant to §61.018(a), TEX. NAT. RES. CODE.

Venue for this proceeding is proper in Travis County pursuant to §61.018(a), TEX. NAT. RES. CODE.

IV.

Open Beaches Act

Section 61.013, TEX. NAT. RES. CODE, (Supp. 1982) provides:

> (a) It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively:
>
> (1) to enter or to leave any public beach; or
>
> (2) to use lawfully and legally any public beach or any larger area abutting on or contiguous to a public beach if the public has acquired a right of use or easement to or over the

area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) For purposes of this section, 'public beach' shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous right in the public since time immemorial as recognized by law or custom.

V.

Defendants' Structure

Defendants, Robert L. Matcha and wife, Anne Morgan Matcha, own certain land located on or adjacent to the Gulf of Mexico beach in the Sea Isle subdivision on Galveston Island. More particularly, defendants own the thirteenth lot southwest of the intersection of San Jacinto Drive and the Gulf of Mexico shore in Sea Isle. This lot is described in the deed records of Galveston County as follows:

> The SURFACE ONLY of the South 70 feet of Lot 60 and a 30' strip adjacent thereto on the South of said Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Volume 254-A, page 76, in the office of the County Clerk of Galveston County, Texas.

A copy of the deed to this property is attached to this petition as Exhibit A.

Plaintiff would show that upon the above-described lot is the remaining foundation, floor, and portions of walls of a wood-frame house that was substantially destroyed during Hurricane Alicia on August 18, 1983. This structure is located entirely seaward of the line of vegetation. On September 7, 1983, the Texas Attorney General's Office posted notice upon this structure that reconstruction may be in violation of the Texas Open Beaches Act. A copy of this notice is attached to this petition as Exhibit B. Prior to

the posting of this notice, defendants, or their agents, had initiated the reconstruction, repair and rehabilitation of this structure. Subsequent to such posting defendants continued to engage in these activities. Unless restrained, defendants will continue to do so.

VI.

Public Beach

Plaintiff would show that the public has acquired a right of use or easement in the public beach area upon which is situated defendant's structure described above. In this area between the line of mean low tide and the line of vegetation, the public has acquired a right of use or easement by virtue of prescription or dedication or estoppel, or has retained a right of use and easement by virtue of continuous right in the public since time immemorial as recognized by law or custom. Accordingly, plaintiff would show that whatever rights, if any, defendants have to such area are subordinate to the right of lawful use and access of such area by the general public.

Plaintiff would show that the line of mean low tide and the vegetation line along the beaches of Galveston County, Texas, are affected by numerous natural and artificial factors including climate, storm frequency and intensity, local and eustatic sea level conditions, sediment budget, and human activities. Along certain portions of the beach, these effects have been nominal and consequently the public beach area has been relatively stationary over a period of many years. Along other parts of the beach, these effects have been dramatic and consequently the public beach area has shifted laterally over relatively short periods of time. Plaintiff would show the Court that it is the law and public policy of this State that the public beach area extends from the line of mean low tide to the line of vegetation wherever such lines may be located at any particular point in time.

In particular, plaintiff asserts that the public right of use and easement to the beach pertinent to these defendants has already been adjudicated and found to exist by virtue of Cause No. 93,728, *Attorney General of Texas, et al. v. Seaway Company,*

Inc., 122nd Judicial District, Galveston County, Texas, June 6, 1961. Plaintiff asserts that this adjudicated public beach easement has shifted landward and seaward over time with the natural shifting of the line of vegetation and the line of mean low tide. Defendants' property currently is encompassed in this adjudicated easement, which has most recently shifted in a landward direction by virtue of the erosive actions of Hurricane Alicia.

VII.

Violation

Plaintiff would show the Court that the reconstruction, repair, and rehabilitation of defendants' structure is the "creation, erection, or construction" of an "obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public" to "enter" and "lawfully use" the public beach area described above. Such activity is in violation of Section 61.013, TEX. NAT. RES. CODE and is contrary to the common law right of the public and the public policy of this State.

VIII.

Injunction

Section 61.018, TEX. NAT. RES. CODE, expressly provides for the imposition of prohibitory and mandatory injunctive relief in suits brought to protect the right of the public in the public beach areas of this State. The facts alleged above by plaintiff demonstrate that defendants are currently violating the Texas Open Beaches Act and the common law right of the public and interfering with lawful use and access of the public beach area. Unless restrained by this Court, defendants will continue to so violate the law. Accordingly, plaintiff seeks a permanent injunction which (1) restrains the defendants from continuing the reconstruction, repair, and rehabilitation of this structure, (2) requires defendants to remove the above-described structure and appurtenances to a location landward of the current natural line of vegetation, and (3) prohibits defendants from further interfering or restraining in any manner the right of the public to free and unrestricted use and access of the public beach area described herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for the following:

(1) That defendants be permanently enjoined as set out in Paragraph VIII above and to otherwise refrain from interfering with the right of the public in the public beach area;

(2) For all costs of court; and

(3) For any further relief in law or in equity to which plaintiff may show itself justly entitled.

Respectfully submitted,

JIM MATTOX

Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

JIM MATHEWS
Assistant Attorney General
Chief, Environmental Protection Division

/s/ Ken Cross

KEN CROSS
SBN 05135800
Assistant Attorney General
Environmental Protection Division

P. O. Box 12548
Austin, Texas 78711
(512) 475-4143

AFFIDAVIT

STATE OF TEXAS §

COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority, on this day personally appeared David J. Preister, Assistant Attorney General, personally known to me, who being duly sworn, states that he is over 21 years of age, that he is competent to testify, that he is familiar with the facts and matters alleged in the preceding Petition, that he has read same, and that such facts are true and correct, and that he has authority to make this affidavit.

David J. Preister

David J. Preister

SUBSCRIBED AND SWORN TO before me this *23rd* day of *May*, 1984, by David J. Preister, to certify which, witness my hand and seal of office.

Barbara M. Duvall

Notary Public In and For
The State of Texas
My commission expires: *7/13/85*

STATE OF TEXAS §

COUNTY OF GALVESTON §

KNOW ALL MEN BY THESE PRESENTS:

That I, WILLIAM A MEYER, Grantor,

of Galveston County, Texas, in consideration of the sum of TEN AND NO/100 ----------Dollars ($10.00) paid by the grantees hereinafter named, the receipt of which is hereby acknowledged, and for the further consideration that said grantees,

ROBERT L. MATCHA and wife, ANN MORGAN MATCHA,
10142 Pebble Park Lane, Houston, Texas, 77036

have executed their one promissory note of even date herewith for the sum of

TWENTY THOUSAND AND NO/100----------Dollars ($20,000.00), payble to the order of WILLIAM A MEYER,

at Galveston, Texas,

bearing interest at the rate of 14% per cent per annum from date until maturity, past due principal and interest to bear 14% interest per annum from maturity until paid, principal and interest being payable in monthly installments of

FOUR HUNDRED SIXTY-FIVE AND 37/100-------Dollars ($465.37), or more, each, payable on the 1st day of each and every month, beginning July 1st, 1982, and continuing on the same day of each and every succeeding calendar month thereafter, until June 1, 1983, when the entire balance of principal remaining due and owing, plus all accrued interest thereon shall be then due and payable; interest being calculated on the unpaid principal to the date of each installment paid, and the payment made then credited, first to the discharge of the interest accrued, and the balance to the reduction of the principal.

BEST AVA

said note containing the usual provision for 10% attorney's fees and acceleration of maturity clauses and being secured by a VENDOR'S LIEN herein and hereby expressly retained in favor of the holder thereof on the property hereinafter described, and also by a DEED OF TRUST thereon of even date herewith to SAM G. TRAMONTE, Trustees have GRANTED, SOLD AND CONVEYED and by thse presents do GRANT, SELL AND CONVEY unto ROBERT L. MATCHA and wife, ANNE MORGAN MATCHA - - - Grantees, Address:10142 Pebble Park Lane, Houston, TX 77036,

of Harris County, Texas, all that certain property situated in Galveston, County Texas, described as follows, to-wit:

The SURFACE ONLY of the South 70 feet of Lot 60 and a 30' strip adjacent thereto on the South of said Lot 60, SEA ISLE, a Subdivision, in Galveston County, Texas, according to the map thereof recorded in Map Volume 254-A, page 76, in the office of the County Clerk of Galveston County, Texas.

This conveyance is made and accepted subject to the following:

1. Maintenance charge as described in instrument of record in Vol. 1921, page 557, in the office of the County Clerk of Galveston County, Texas.

Mineral reservations as described in Deeds of record in Vol. 957, page 350 and in Vol. 1037, page 367, both in said County Clerk's office.

3. Royalty reservation as described in deed of record in Vol. 565, page 419, in said County Clerk's office.

4. Right-of-way as described in instrument of record in Vol. 1169, page 201, in said County Clerk's office.

5. Utility and aerial easements as described in instruments of record in Vol. 254-A, page 76 and in Vol. 1921, page 557, both in said County Clerk's office.

LABLE COPY

6. Restrictions, covenants and conditions, to the extent same are still in effect, imposed on said property by instrument of record in Vol. 1921, page 557, in said County Clerk's office.

TO HAVE AND TO HOLD the said premises, together with all rights, hereditaments and appurtenances thereto belonging, unto the said grantee "above named, their heirs and assigns forever. And I do hereby bind myself, my heirs, executors and administrators, to WARRANT AND FOREVER DEFEND the title to said property unto the said grantees above named, their heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

EXECUTED this, the *22nd* day of *May*, A.D. 1982.

/s/ William A. Meyer

WILLIAM A. MEYER

STATE OF TEXAS §
COUNTY OF GALVESTON §

Before me, the undersigned authority, on this day personally appeared WILLIAM A. MEYER, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this, the *22* day of *May*, 1982.

/s/ Barbara M. Duvall

Notary Public for the STATE OF Texas

A-29

NOTICE

THIS STRUCTURE APPEARS TO BE LOCATED ON THE PUBLIC BEACH, BEING THAT AREA BETWEEN THE LINE OF MEAN LOW TIDE AND THE LINE OF NATURAL VEGETATION, SUBSTANTIAL REPAIR OR RECONSTRUCTION OF THIS STRUCTURE MAY BE IN VIOLATION OF THE TEXAS OPEN BEACHES ACT, SECTIONS 61.001-61.024, TEXAS NATURAL RESOURCES CODE. A VIOLATION OF THE ACT COULD RESULT IN COURT ORDERED REMOVAL OF THE STRUCTURE AND/OR ASSESSMENT OF CIVIL PENALTIES. FOR YOUR OWN PROTECTION, BEFORE INITIATING REPAIR OR RECONSTRUCTION, CONSULT:

TEXAS ATTORNEY GENERAL'S OFFICE
ENVIRONMENTAL PROTECTION DIVISION
P.O. BOX 78711
AUSTIN, TEXAS 78711
(512) 475-4143

Supreme Court, U.S.
FILED
MAR 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1346 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ROBERT MATCHA AND ANNE MORGAN MATCHA,
Petitioners,

v.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney General for Litigation

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Attorneys for Respondent

March 23, 1987

***Counsel of Record**

28pp

QUESTION PRESENTED FOR REVIEW

Whether a common law migratory boundary of a littoral public easement effects an unconstitutional taking of property when natural erosion moves the boundary in a landward direction.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Respondent's Brief in Opposition 1

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of the Case 2

Summary of Argument 5

Reasons Writ Should Be Denied 7

I. Adjudication of the common law public beach easement on West Beach, Galveston Island raises no substantial or important federal question 7

II. Departure from the natural line of vegetation as the landward boundary of the public easement on West Beach would cause confusion, inequity, and eventual loss of the easement 11

Conclusion 15

Appendix A-1

TABLE OF AUTHORITIES

Cases **Page**

Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935) . . 8

California, ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982) 7

City of Corpus Christi v. Davis, 622 S.W.2d 640 (Tex. App.—1981, writ ref'd n.r.e.) 9,13

County of Hawaii v. Sotomura, 517 P.2d 57 (Hawaii 1973) . . . 10

Feinman v. State, 717 S.W.2d 106 (Tex.App.—1986, writ ref'd n.r.e.) 3,6,7,12,14

Hughes v. Washington, 389 U.S. 290 (1967) 7

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 11

Lakefront Trust, Inc. v. City of Port Arthur, 505 S.W.2d 606 (Tex.App.— 1974, writ ref'd n.r.e.) 9

Matcha v. Mattox, 711 S.W.2d 95 (Tex.App.—1986, writ ref'd n.r.e.) 3,5,6,7,9

Moody v. White, 593 S.W.2d 372 (Tex.App.—1979, no writ) . 4,9

Nollan v. California Coastal Commission, No. 86-133 (U.S., appeal filed and pending) 11

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 8

Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex.App.—1964, writ ref'd n.r.e.) 2,3,7,9,10

State v. Balli, 190 S.W.2d 71 (Tex. 1944), *cert. denied*, 328 U.S. 852 (1946) 6,9

State v. Markle, 363 S.W.2d 332 (Tex.App.—1962, no writ) . 4,10

United States v. St. Thomas Beach Resorts, Inc., 386 F.Supp. 769 (D.V.I. 1974), *aff'd mem.*, 529 F.2d 513 (3d Cir. 1975) 9

Constitution and Statutes

U.S. Const. amend. V 1,5,8,12,13

U.S. Const. amend. XIV 1,8

TEX.NAT.RES.CODE ANN.

Sec. 61.001-61.025 2,4

Sec. 61.001(2) 2

Sec. 61.012 4

Sec. 61.018 4

No. 86-1346

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ROBERT MATCHA AND ANNE MORGAN MATCHA,
Petitioners,

v.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jim Mattox, Attorney General of Texas, on behalf of the people of Texas, hereby submits his brief in opposition to the petition for a writ of certiorari, which seeks review of the decision of the Texas Court of Appeals in this case.

OPINION BELOW

The opinion of the Texas Court of Appeals, Third Supreme Judicial District, sitting in Austin, Texas, is reported at 711 S.W.2d 95 (1986). This opinion is reproduced at Petitioners' Appendix, pp. A-8–A-17.

JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. §1257(3). For the reasons set forth below, this Court should exercise its discretionary jurisdiction to deny petitioners' request for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners invoke portions of the Fifth and the Fourteenth Amendments to the United States Constitution, which they set forth at page 6 of their petition. Petitioners also discuss certain provisions of what is commonly referred to as the

"Texas Open Beaches Act," TEX.NAT.RES.CODE ANN. §§61.001 et seq., which petitioners set forth in part at pp. 7-8 of their petition. The act, as it relates to the arguments of both respondent and petitioners, is set forth in Appendix A to this brief.

STATEMENT OF THE CASE

This case is a common law property dispute concerning the boundary of a public easement along the shoreline of West Beach, Galveston Island, Texas. Galveston Island is a barrier island off the Texas mainland along its upper Gulf of Mexico coast. The island was formed in the late Pleistocene Period, when rising sea level caused the Texas shoreline to retreat and partial erosion of the headlands formed sediment that accreted to create a barrier island. The City of Galveston, at least its historical and more densely urbanized portion, occupies the east end of the island, protected from the Gulf of Mexico by a massive seawall. Extending west from the west end of the city seawall to San Luis Pass, a distance of approximately 20 miles, lies that portion of Galveston Island known as "West Beach." West Beach is a more sparsely developed portion of the island, partially subdivided into lots supporting beach houses used primarily as rental properties, vacation homes and retirement homes.

Since at least 1840, the dry beach portion of the Gulf beach along West Beach, i.e. that area between the line of vegetation[1] and the line of mean high tide, has been in private ownership.[2] *Seaway Co. v. Attorney General*, 375 S.W.2d 923, 928 (Tex.App.—1964, writ ref'd n.r.e.). However, since before 1840, the general public has freely used the privately-owned dry sand beach along West Beach as a public road and for

---

1. The "line of vegetation" is generally understood to be the landward boundary of the natural and legal beach. It is defined as "the extreme seaward boundary of natural vegetation which spreads continuously inland." TEX.NAT.RES.CODE ANN. §61.001(2).

2. In 1840 the littoral uplands along West Beach were patented out of the Republic of Texas to Edward Hall and Levi Jones. The "wet beach", that portion of the beach seaward from the mean high tide to the mean low tide, was retained and is today part of the State of Texas' submerged lands.

numerous recreational activities. *See Seaway Co. v. Attorney General, id.* at 931-939. Public use of West Beach has been bounded by the vegetation line on the landward side and the shoreline, or water's edge, on the seaward side. This longstanding public use has ripened under Texas common law into an easement or right of use and access over the privately-owned dry sand beach along West Beach. *Matcha v. Mattox,* 711 S.W.2d 95 (Tex.App.—1986, writ ref'd n.r.e.); *Feinman v. State,* 717 S.W.2d 106 (Tex.App.—1986, writ ref'd n.r.e.); *Seaway Co. v. Attorney General, supra.*

Characteristic of their barrier island heritage, both the vegetation line and the shoreline on West Beach are dynamic. On a daily basis, the beach widens and narrows with the fluctuations of the tides. After erosive storms,[3] the beach widens as a result of vegetation line erosion and gradually narrows between storms as vegetation colonizes seaward. Over a longer period of time, the beach corridor itself on West Beach has migrated in a landward direction, i.e. has eroded, as both the vegetation line and the shoreline have lost ground on a net basis over the course of many storms and seasonal fluctuations. The foreseeable trend on West Beach calls for continued net erosion, owing to the combined influences of sediment supply deficit, sea level rise, and storms.

These historical movements of the beach have been attended by free and unobstructed public use of West Beach. The public has freely used the beach landward to the vegetation line at all times: before storms, after storms, and in between storms. The longstanding community understanding about the use of the area seaward of the vegetation line was that the public always had a right to be there. *Matcha v. Mattox,* 711 S.W.2d at 99; *Feinman v. State,* 717 S.W.2d at 111-114.

Against this backdrop, petitioners entered the scene in 1982, when they purchased a beachfront property, unimproved Lot 60, Sea Isle Subdivision, on West Beach. Later that year they had a house built on the lot, facing the Gulf of Mexico. The

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3. Approximately 50 hurricanes and tropical cyclones have affected Galveston Island since 1900, most notably the unnamed hurricane of 1900 which established itself as the worst natural disaster in United States history after leaving 6000 island residents dead or missing in its wake.

structure was erected just landward of the then-existing location of the vegetation line. The petitioners operated this structure as a rental property.

The following summer Hurricane Alicia made landfall on West Beach, all but destroying petitioners' structure, removing approximately four feet of elevation from their lot, and considerably eroding the vegetation line all along West Beach. In the vicinity including petitioners' lot, the vegetation line eroded over 100 feet landward from its pre-storm position, leaving the remains of petitioners' structure on the bare sand beach entirely seaward of the vegetation line.

Over respondent's objection, petitioners proceeded to reconstruct their structure. Respondent filed suit in Travis County, Texas, district court and obtained temporary orders prohibiting petitioners from continuing with reconstruction. (*See* Petitioners' Appendix, pp. A-19–A-29.) Suit was brought by respondent under authority provided in Section 61.018 of what is commonly known as the "Texas Open Beaches Act," TEX.NAT.RES.CODE ANN. §§61.001-61.025. This statute, adopted in 1959, authorizes the Attorney General, or certain other designated public attorneys, to protect the public's beach easement from encroachment. Texas courts have held that the act neither creates nor acquires any public beach rights but only recognizes those rights on the privately-owned dry beach which have been perfected by the public at common law. *See* Section 61.012; *State v. Markle,* 363 S.W.2d 332, 336 (Tex.App.—1962, no writ); *Moody v. White,* 593 S.W.2d 372, 377 (Tex.App.—1979, no writ).

Between the winter of 1983 and before trial, the petitioners hauled in sand and with it built a wall on the dry beach seaward of their structure, filled in their Lot 60, and planted their property and adjacent areas with sprigs of grass which they then watered and fertilized. By trial, this artificially induced vegetation surrounded petitioners' lot and extended seaward of it. At time of trial, the naturally located vegetation line remained essentially unchanged in position from the time of hurricane landfall, approximately one year prior.

Upon trial, the district court entered a directed verdict finding that the public had acquired an easement for free and unobstructed use and access to the beach from the natural vegetation line seaward to the line of low tide, based upon common law custom, implied dedication, and prescription. Further, the court concluded that this public easement is migratory, moving with the natural movements of its boundaries, the vegetation line and the low water's edge. Thus, finding that petitioners' structure and plantings obstructed the public easement seaward of the natural vegetation line, the district court ordered them removed and prohibited any construction or reconstruction seaward of the natural line of vegetation.

Petitioners appealed to the Texas Court of Appeals, Third Supreme Judicial District, sitting in Austin, which affirmed the judgment of the trial court upon the common law doctrine of custom. The court of appeals overruled petitioners' point of error asserting that the district court judgment effected an unconstitutional taking of their property without just compensation. The court in its opinion simply noted that the easement was acquired not by virtue of the Open Beaches Act but instead through common law. 711 S.W.2d at 101. The Supreme Court of Texas denied petitioners' application for a writ of error, with the notation "no reversible error." Thereupon, petitioners applied to this Court for a writ of certiorari.

SUMMARY OF ARGUMENT

The petition for writ of certiorari raises no substantial federal question. The naturally migratory public beach easement adjudicated below derives from state common law, particularly the real property doctrines of custom, implied dedication and prescription. No basis exists for substituting any federal common law or a federal rule of decision for state law to define the nature of this property right.

Neither does adjudication of this property right raise any substantial question of a "taking" of property in violation of the Fifth Amendment to the United States Constitution. As found below, the migratory nature of the public easement is an integral part of the historic custom and usage which created the easement itself. 711 S.W.2d at 98-100. Moreover,

Texas coastal property law provides for a migratory title boundary at the shoreline. *State v. Balli*, 190 S.W.2d 71 (Tex. 1944), *cert. denied*, 328 U.S. 852 (1946). A migratory easement boundary along the dry beach is but a physical and legal adjunct to migratory title boundary along the wet beach. *Matcha v. Mattox*, 711 S.W.2d at 100; *Feinman v. State*, 717 S.W.2d at 110.

Required departure from the migrating vegetation line as the landward boundary of the West Beach easement would engender confusion, inequity, and subsequent loss of the easement itself. By visibly delineating the landward extent of the physical beach, the natural line of vegetation has always functioned as a convenient, readily discernible marker of the landward limit of the "legal," public beach as well. Departure from a current, visible line of vegetation would unnecessarily render the daily location of the public use boundary pure guesswork. *Feinman v. State*, 717 S.W.2d at 111.

Requiring either a fixed or an accretionary-only public easement would eliminate the natural equities built into the common law of migratory coastal boundaries. Under the established Texas law of accretion and erosion, a littoral owner may either gain coastal property or lose it as natural events move the shoreline landward and seaward. By accepting a migrating boundary only in the event of accretion, petitioners obtain all the benefit and risk none of the burden of coastal property ownership. Alternatively, a static beach easement, also advocated by petitioners, will result in its loss either under the waves of the Gulf of Mexico—as the beach erodes—or under the advancing vegetation of the littoral upland—as the beach accretes.

Petitioners' view of the Takings Clause would convert every state common law accretion, erosion, and avulsion case into a compensable federal claim. In coastal jurisdictions where sea level rise and coastal erosion are looming problems, it is fiscally untenable for state and local governments to follow the landward drift of the shoreline with constitutionally required compensation.

REASONS THE WRIT SHOULD BE DENIED

I.

Adjudication of the common law public beach easement on West Beach, Galveston Island raises no substantial or important federal question.

A.

The public beach easement complained of by petitioners derives from the Texas common law of property rights along its dynamic Gulf of Mexico coast. As a product of state property law, neither the creation of the public beach easement nor its migratory nature raises a federal question.

The trial court below found that the public enjoys a migratory easement for unobstructed passage and recreation on the "dry beach" portion of West Beach under three separate state common law doctrines: custom, implied dedication, and prescriptive right. On the basis of custom, the court of appeals affirmed.[4] *Matcha v. Mattox*, 711 S.W.2d at 98. The court of appeals noted that there was no doubt that the longstanding public use of the dry beach had given rise to the public's easement under the ancient doctrine of custom. *Id.* at 99. Further, the ambulatory nature of the public easement was viewed as particularly "... compatible with the doctrine of custom and the situations that often give rise to a custom." *Id.* at 100. By its refusal of the petitioners' application for a writ of error, the Supreme Court of Texas found no reversible error with this assessment of common law property rights on West Beach.

No basis exists for invoking or substituting any federal law principles to define the coastal property rights herein, as was done, for example, in *California, ex rel. State Lands Commission v. United States*, 457 U.S. 273 (1982) or in *Hughes v. Washington*, 389 U.S. 290 (1967). Petitioners point to no

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4. The public easement on West Beach has also been upheld on the basis of implied dedication, *Feinman v. State, supra*, and prescription, *Seaway Co. v. Attorney General, supra.*

incident of title or fact situation calling for a determination under federal common law. Petitioners' title to Lot 60 in Sea Isle Subdivision does not trace back to any United States patent or grant. Rather, the chain of title runs back to an 1840 patent out of the Republic of Texas to private individuals, with no intervening ownership or possession by the United States Government. Neither does the easement boundary disputed herein, the natural line of vegetation, demark any interstate or international boundary, thereby triggering possible federal concerns. Thus, Texas law controls the determination of the public beach easement on West Beach of Galveston Island. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977); *Borax Consolidated, Ltd, v. Los Angeles*, 296 U.S. 10, 22 (1935). As adjudicated under this law, an easement exists on West Beach under the common law of custom and migrates with the natural fluctuations of its monuments: the vegetation line and the low tide line.

B.

Petitioners assert one federal basis in their attack on the migratory nature of the West Beach public easement. Characterizing the court adjudication below as "regulatory" activity brought about by the "state action" of the Texas Attorney General, petitioners claim a naturally migratory easement constitutes a "taking" of property without just compensation in violation of the Fifth Amendment to the United States Constitution, as applied to the states under the Fourteenth Amendment. The question thus becomes whether the migratory, common law boundary of the public easement on West Beach effects an unconstitutional "taking" when nature moves the boundary landward.[5] Respondent submits that to pose the question thusly is to answer it, for court application of state common law property principles, especially governing coastal boundaries, does not constitute an unconstitutional taking.

Neither the creation of the public beach easement nor its dynamic nature unconstitutionally take property. The common

5. Petitioners, inaccurately, frame the question in terms of a regulatory action of the State of Texas pursuant to its police power.

law principles upon which the public beach right in Texas rests—custom, implied dedication, and prescription—are the legally recognized means by which individuals may indeed gain rights in another's property without the requirement of compensation. Thus Texas courts have given little credence to arguments that judicial recognition of the existence of the easement offends constitutional prohibitions against governmental takings without compensation.[6] *See: Matcha v. Mattox,* 711 S.W.2d at 101; *Seaway Co. v. Attorney General,* 375 S.W.2d at 930; *Moody v. White,* 593 S.W.2d at 379-380. *See also United States v. St. Thomas Beach Resorts, Inc.,* 386 F. Supp. 769, 772 (D. V.I. 1974), *aff'd mem.,* 529 F.2d 513 (3d Cir. 1975) (applying the Virgin Islands Open Shoreline Act, similarly worded to the Texas Open Beaches Act).

The natural amenability of the beach easement to shorefront dynamics is inherent in the common law creation of the right, at least regarding the West Beach easement. The undisputed evidence at trial established that, for 150 years, the public has freely used and littoral property owners have freely made available all of the privately-owned dry sand beach landward to the natural line of vegetation, whatever the location of the vegetation line at any point in time, regardless of storms. The very custom itself on West Beach has embodied the notion of a migratory public use boundary that corresponds with the natural monuments of the beach.

In this sense a migratory coastal *easement* boundary is no different legally than a migratory coastal *title* boundary. Texas adopts the familiar coastal property rule whereby the title boundary, the line of mean high tide, is subject to movement with the natural processes of erosion and accretion. Thus loss of privately-owned littoral uplands to state-owned submerged lands beneath the sweep of the tide is simply a noncompensable loss to the littoral property owner. *State v. Balli,* 190 S.W.2d 71 (1944), *cert. denied,* 328 U.S. 852 (1946); *City of Corpus Christi v. Davis,* 622 S.W.2d 640 (Tex.App.—1981, writ ref'd n.r.e.); *Lakefront Trust, Inc. v. City of Port Arthur,* 505 S.W.2d 606 (Tex.App.—1974, writ ref'd n.r.e.). *Accord*

6. Petitioners contend that Texas courts have declined to address this issue. To the contrary, the taking issue has been met and dispatched as without merit.

County of Hawaii v. Sotomura, 517 P.2d 57 (Hawaii 1973) (reversing even a token award of $1 as compensation for 1.120 acres of shorefront uplands lost to the Pacific Ocean by erosion). Under Texas law, the movement of the public beach easement boundary is a legal parallel to the movement of the title boundary.

In order to raise a federal takings issue, petitioners depict the trial court judgment below as a "regulatory" activity resulting from the "state action" of the Attorney General under the Texas Open Beaches Act. This characterization is both inaccurate and unhelpful. The West Beach public easement at issue is not the product of any exercise of the police power. Rather, it is a result of many decades of public use in satisfaction of the common law elements in the doctrines of custom, implied dedication, and prescription. The Open Beaches Act itself did not create this public beach right or its migratory nature; the act merely recognizes whatever rights the public may have perfected and provides an enforcement mechanism for these rights through governmental attorneys. *State v. Markle*, 363 S.W.2d 332, 336 (Tex.App.—1962, no writ). "There is nothing in the act which seeks to take rights from an owner of land." *Seaway Co. v. Attorney General*, 375 S.W.2d at 930.

The Attorney General or the State of Texas appears in open beach cases only as a nominal party. The real party in interest is the public itself in the strictest sense. Indeed, given requisite standing, any member of the public could bring suit in state court to enjoin or remove encroachments to the public's easement on West Beach. Simply put, it is the public's easement rather than the state's.

Petitioners compound the inaccuracy by attempting to pigeonhole the West Beach public easement into the regulatory takings category represented by the authorities cited in part II of their petition. These cases analyze whether legislation or administrative regulation, in pursuit of albeit legitimate police power objectives, has been so excessive as to effect a *de facto* taking of property interests without compensation. As explained, the public easement on West Beach derives not from government regulation but from application of common law prop-

erty principles. Petitioners' authorities are inapposite.[7]

One coastal case cited by petitioners concerning a barrier beach is distinguishable. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court held that the U.S. Army Corps of Engineers could not, without compensation, impose the federal navigational servitude for public access over a private marina situated on a Hawaiian "fish pond" segregated from the public waters of the Pacific Ocean by a barrier beach. This Court reasoned that this area was not legitimately within a publicly navigable waterway traditionally subject to the servitude. Significant in this Court's holding was that the marina occupied an area considered private under longstanding Hawaii colonial and state law, now connected to the Pacific only by an artificial channel dug out from the marina with the consent of the Federal Government itself. By contrast, through their own acts of purchasing and improving property at the very edge of the sea, petitioners find themselves within the natural boundaries of the beach and in an area historically deemed public domain under longstanding Texas custom and usage.

For these reasons, petitioners cannot properly present a federal question of substance or import arising from the common law property dispute adjudicated below.

II.

Departure from the natural line of vegetation as the landward boundary of the public easement on West Beach would cause confusion, inequity, and eventual loss of the easement.

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7. On the same basis, another beach-related, Takings Clause case currently before this Court has no bearing on this instant petition. In *Nollan v. California Coastal Commission*, No. 86-133, provision of public beach access was imposed by the state coastal development regulatory agency as a condition for granting a permit to enlarge a beachfront house. The source of this beach access requirement was the state's police power invoked to promote development control objectives, not the state's common law and any particular public right perfected thereunder. Whatever the disposition of *Nollan*, it will neither control nor affect petitioner's case.

A.

Petitioners invoke the Fifth Amendment to invalidate any post-Alicia location of the vegetation line as the landward boundary of the West Beach public easement. Petitioners would apparently have the public and littoral property owners continue to hew to the pre-storm location of the vegetation line, albeit invisible. Obviously, such a result would lead to confusion as to the boundary of the public beach.

The very basis of the vegetation line's ripening into the landward boundary of the beach easement is that this natural monument has always visibly defined the physical beach. To the typical beachgoer on West Beach, the "legal" beach has always coincided with the natural beach, that area from the water's edge landward to the line of dense vegetation growth on the upland. Public use, and landowner acceptance of it, was confined to that area, visibly delineated by nature. Thus the legal boundaries of the public beach, by longstanding custom and usage, became boundaries precisely because they were "written on the soil." For a typical beachgoer visiting the beach without aid of surveying sextant and historical records, petitioners' advocated abandonment of the visible natural vegetation line would make the location of the public beach easement pure guesswork. *Feinman v. State,* 717 S.W.2d at 111.

B.

Petitioners also invoke the Fifth Amendment to eliminate the natural equity inherent in the common law rule of migratory coastal boundaries. As mentioned previously, under Texas law, littoral title shifts landward and seaward with the natural movements of the line of mean high tide. Thus property purchasers assume the risk of either property loss or property gain when investing in real estate at the edge of the Gulf of Mexico. The migratory easement, like migratory title, incorporates both risks. If the upland owner buys property and the beach accretes, nature shifts the public easement seaward and the littoral owner gains. If the owner buys property and the beach erodes, nature shifts the public easement landward and the littoral owner loses. This legal mirroring of natural processes im-

plements what is common sense and intuitive: it is unrealistic to rely on stability at the edge of a barrier beach. Somehow, petitioners construe the Fifth Amendment to entitle them to risk only the potential for benefit but never for loss on the dynamic shorefront of West Beach.

This potential for gain through natural accretion and seaward movement of vegetation mitigates petitioners' claim of "no remaining economic value or residual market value in their land."[8] It is possible that the vegetation line may advance sufficiently seaward in post-Alicia recovery to render petitioners' Lot 60 more fully marketable or "buildable," at least until the next storm or storms leaves the lot on the bare sand beach beyond the range of any natural post-storm recovery. Indeed, petitioners themselves validate this hopeful scenario by their description of Alicia's impact as a "temporary disruption" and their contentions of a recovered or recovering vegetation line.

By their taking claim, petitioners suggest some constitutional-level inequity in an easement boundary which legally migrates by virtue of sudden storms and hurricanes as well as by slower forms of coastal erosion. However, coastal storm events cannot with scientific defensibility be separated from the complex matrix of factors influencing the long-term erosion of a littoral, barrier beach such as West Beach. Hurricanes and storms, as common visitors to the Gulf Coast of Texas, simply represent one end of a continuous spectrum of wind and wave activity constantly shaping Texas' shores. *See City of Corpus Christi v. Davis,* 622 S.W.2d at 646. As a part of life on the Texas Gulf Coast, storms are an inherent risk of coastal property ownership.

C.

The loss of the migratory character of the West Beach easement would spell the loss of the easement itself. On an eroding beach both the vegetation and the low tide line, the historical boundaries of the natural beach, are by definition moving land-

8. Petitioners made no evidentiary showing of the economic value or market value of their property at trial below. This assertion at page 19 of their petition is speculative.

ward over time. A legally migratory public easement preserves the historical public rights perfected between these two dynamic lines. On the other hand, the static or fixed easement advocated by petitioners will eventually disappear beneath the encroaching waves of the Gulf. *Feinman v. State*, 717 S.W.2d at 111.

Conversely, in an accreting area, a static easement will effectively narrow or disappear, as encroaching vegetation consumes it from the landward side of the easement. Moreover, the easement will become physically separated from the Gulf of Mexico. Accreting sand on the seaward side of the easement will shift the high tide line seaward. Texas common law will deliver title to this accretion to the upland owner. However, since this accreted title will be unencumbered with the stationary easement, a strip of privately-owned sand will separate the public easement from the water. Thus under petitioners' view the public would retain an easement situated in densely vegetated uplands and detached from the sea, which serves nobody's purpose and departs from the historical custom and usage of the Gulf Coast beachfront. By contrast, the naturally migratory easement recognized by the court of appeals below automatically adjusts public rights seaward to follow the natural location of the traditional beach.

D.

If petitioners prevail, the public would be required either to repeatedly buy back the beach as it migrates landward over time through erosion or to lose the public easement, and on West Beach 150 years of custom, to the encroaching waters of the Gulf of Mexico. To be logically consistent, the petitioners would also be entitled to compensation when and if the line of mean high tide finally moves upon their Lot 60 and the State of Texas claims ownership under its longstanding common law rule of migratory coastal title. Indeed, petitioners' position holds the potential for converting every littoral or riparian case involving erosion or accretion and public lands into a Takings Clause case. The demand on the public treasury for a constant, constitutionally required purchase and repurchasing of public rights along public waterways is obvious and considerable.

The implications extend far beyond Texas' shores. Many

other parts of the United States coast are similarly experiencing erosion, particularly the barrier beaches of the Atlantic Ocean, where the much publicized, world-wide rise in sea level exerts dramatic influence on gently sloping shorelines. Petitioners' reading of the Constitution to require the public to pay them for the natural consequences of shoreline erosion is literally, as well as legally, unnatural.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Texas Open Beaches Act

TEX.NAT.RES.CODE ANN. §§61.001-61.024

Section 61.001. Definitions

In this chapter:

(1) "Department" means the Parks and Wildlife Department.

(2) "Line of vegetation" means the extreme seaward boundary of natural vegetation which spreads continuously inland.

(3) "Highest wave" means the highest swell of the surf with such regularity that vegetation cannot grow and does not refer to the extraordinary waves which temporarily extend above the line of vegetation during storms and hurricanes.

(4) "Littoral owner" means the owner of land adjacent to the shore and includes anyone acting under the littoral owner's authority.

(5) "Public beach" means any beach area, whether publicly or privately owned, extending inland from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico to which the public has acquired the right of use or easement to or over the area by prescription, dedication, presumption, or has retained a right by virtue of continuous right in the public since time immemorial, as recognized in law and custom.

§ 61.011. Public Policy

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the

state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

§ 61.012. Definition

In this subchapter, "beach" means state-owned beaches to which the public has the right of ingress and egress bordering on the seaward shore of the Gulf of Mexico or any larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

§ 61.013. Prohibition of Obstructions

(a) It is an offense against the public policy of this state for any person to create, erect, or construct any obstruction, barrier, or restraint that will interfere with the free and unrestricted right of the public, individually and collectively:

(1) to enter or to leave any public beach; or

(2) to use lawfully and legally any public beach or any larger area abutting on or contiguous to a public beach if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) For purposes of this section, "public beach" shall mean any beach bordering on the Gulf of Mexico which extends inland from the line of mean low tide to the natural line of vegetation bordering on the seaward shore of the Gulf of Mexico, or such larger contiguous area to which the public has acquired a right of use or easement to or over by prescription, dedication, or estoppel, or has retained a right by virtue of continuous

right in the public since time immemorial as recognized by law or custom. This definition does not include a beach which is not accessible by a public road or public ferry.

(c) A person who creates, erects, or constructs an obstruction, barrier, or restraint in violation of Subsection (a) of this section is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

§ 61.014. Denial of Access by Posting

(a) As used in this section, "public beach" means the area extending from the line of mean low tide of the Gulf of Mexico to the line of vegetation bordering on the Gulf of Mexico, or to a line 200 feet inland from the line of mean low tide, whichever is nearer the line of mean low tide, if the public has acquired a right of use or easement to or over the area by prescription, dedication, or has retained a right by virtue of continuous right in the public.

(b) Any person who displays or causes to be displayed on any public beach any sign, marker, or warning, or who shall make or have made any written or oral communication which states that the public beach is private property or who states in any other manner that the public does not have the right of access to the public beach in violation of the lawful access rights of the public guaranteed by this subchapter is liable to the state for a civil penalty of not less than $50 nor more than $1,000.

(c) Each day that the communication is made constitutes a separate offense.

(d) Any person who violates the provisions of this section shall be prosecuted in the county in which the public beach is located.

(e) This section does not apply to any island or peninsula that is not accessible by public road or common carrier ferry facility so long as the condition exists.

§ 61.015. Satisfaction of Ingress and Egress Requirement

The requirement of free and unrestricted right of ingress and egress over an area landward of the line of vegetation is considered fully satisfied by access roads or ways which are in existence now and available to the public or which by or with the approval of any governmental authority having jurisdiction may be provided in the future.

§61.016. Boundaries for Areas With No Marked Vegetation Line

(a) To determine the elevation reached by the highest waves of the Gulf of Mexico, in any area in which there is no clearly marked vegetation line (for instance, a line immediately behind well-defined dunes or mounds of sand and at a point where vegetation begins) recourse shall be to the nearest clearly marked line of vegetation on each side of the unmarked area.

(b) The "line of vegetation" for the unmarked area shall be the line of constant elevation connecting the two clearly marked lines of vegetation on each side.

(c) If the elevation of the two points on each side of the area are not the same, the extension defining the line reached by the highest waves of the Gulf shall be the average elevation as between the two points, but if there is no clearly marked line of vegetation, the extended line shall not extend inland further than 200 feet from the seaward line of mean low tide.

§61.017. Line of Vegetation Unaffected by Certain Conditions

(a) The "line of vegetation" is not affected by the occasional sprigs of salt grass on mounds and dunes or seaward from them and by artificial fill, the addition or removal of turf, or by other artificial changes in the natural vegetation of the area.

(b) If the changes listed in Subsection (a) of this section are made and the vegetation line is obliterated or is created artificially, the line of vegetation shall be determined in the same manner as in those areas covered by Section 61.016 of this code, but if there is a vegetation line consistently following a line more than 200 feet from the seaward line of mean low tide, the

200-foot line shall constitute the landward boundary of the area subject to public easement until a final court adjudication establishes the line in another place.

§ 61.018. Suit to Remove Obstructions

(a) The attorney general or any county attorney, district attorney, or criminal district attorney shall file in a district court of Travis County, or in the county in which the property is located, a suit to obtain either a temporary or permanent court order or injunction to remove any obstruction or barrier or to prohibit any restraint or interference which restricts the right of the public, individually or collectively, to free and unrestricted ingress and egress to and from any area described in Section 61.012 of this code or any property abutting on or contiguous to the state-owned beach on which the public has acquired a prescriptive right.

(b) In the same suit, the attorney general, county attorney, district attorney, or criminal district attorney may seek recovery of the costs of removing any obstruction or barrier if it is removed by public authorities pursuant to an order of the court.

§ 61.019. Declaratory Judgment Suits

(a) A littoral owner whose rights are determined or affected by this subchapter may bring suit for a declaratory judgment against the state to try the issue or issues.

(b) Service of citation on the state shall be made by serving the citation on the attorney general.

§ 61.020. Prima Facie Evidence

In a suit brought or defended under this subchapter or whose determination is affected by this subchapter, a showing that the area in question is located in the area from mean low tide to the line of vegetation is prima facie evidence that:

(1) the title of the littoral owner does not include the right to prevent the public from using the area

for ingress and egress to the sea; and

(2) there is imposed on the area, subject to proof of easement, a prescriptive right or easement in favor of the public for ingress or egress to the sea.

§ 61.021. Area Not Covered by Subchapter

None of the provisions of this subchapter apply to beaches on islands or peninsulas that are not accessible by a public road or ferry facility for as long as the condition exits.

§ 61.022. Exemption for Certain Structures

The provisions of this subchapter do not prevent any agency, department, institution, subdivision, or instrumentality of this state or of the federal government from erecting or maintaining any groin, seawall, barrier, pass, channel, jetty, or other structure as an aid to navigation, protection of the shore, fishing, safety, or other lawful purpose authorized by the constitution or laws of this state or the United States.

§ 61.023. Effect on Land Titles and Property Adjacent to and on Beaches

The provisions of this subchapter shall not be construed as affecting in any way the title of the owners of land adjacent to any state-owned beach bordering on the seaward shore of the Gulf of Mexico or to the continuation of fences for the retention of livestock across sections of beach which are not accessible to motor vehicle traffic by public road or by beach.

§ 61.024. Effect of Subchapter on Definition of Public Beach

None of the provisions of this subchapter shall reduce, limit, construct [sic], or vitiate the definition of public beaches which has been defined from time immemorial in law and custom.

MOTION FILED
MAR 19 1987

NO. 86-1346

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT MATCHA AND ANN MORGAN MATCHA,
Petitioners,

V.

JIM MATTOX, ATTORNEY GENERAL OF TEXAS
ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Appeals for the
Third Supreme Judicial District of Texas
Sitting in Austin, Texas

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF GRANT OF WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF	iii
BRIEF OF AMICUS CURIAE	1
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	1
PRELIMINARY STATEMENT	1
I. THE COSTS OF BENEFITS TO SOCIETY AS A WHOLE SHOULD NOT BE BORNE BY ONLY A SMALL PART OF SOCIETY	2
II. THE POLICY UNDERLYING THE JUST COMPENSATION REQUIREMENT OF LIMITING GOVERNMENTAL EXCESS WOULD BE SERVED BY APPLYING THE REQUIREMENT IN THIS CASE	3
III. THE DECISION BELOW FAILS TO SERVE THE IMPORTANT PURPOSE OF HARMONIZING COMPETING SOCIAL NEEDS	6
IV. THE DECISION BELOW DOES NOT COMPORT WITH THE SETTLED EXPECTATIONS OF THE PARTIES	6
CONCLUSION	9

TABLE OF AUTHORITIES

CASES

Armstrong v. United States, 364 U.S. 40 (1960) 2
Griggs v. County of Allegheny, Pennsylvania, 369 U.S. 84 (1962) 3
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 6, 7
Luttes v. State, 324 S.W.2d 167 (Tex. 1958) 8
Moody v. White, 593 S.W.2d 372 (Tex. Civ. App.—Corpus Christi 1979) 8
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) passim
Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 3, 4
Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.) 8
Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) 3

STATUTES

Open Beaches Act, Tex. Nat. Res. Code Ann. sec. 61.011 et. seq. (Vernon 1978 and Supp. 1986) passim

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L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 2, 6

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ON BEHALF OF THE PEOPLE OF TEXAS,
Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Legal Foundation of America respectfully moves for leave to file the attached brief of amicus curiae pursuant to Rule 42 of the Revised Rules of this Court and would show the Court as follows:

1. *Identity of Amicus Curiae.* The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. It is located on the campus of the South Texas College of Law in Houston and shares certain activities and personnel with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, academics and businesspeople.

2. *Interest of Amicus Curiae.* Among LFA's principal aims are the enhancement of the market system of resource allocation, the attainment of a better balance between the federal government and the States, and the furtherance of individual political and economic liberties.

3. *Previous Appearance in the Texas Court, Below.* LFA appeared as amicus curiae in this case in the Court of Appeals for

the Third Supreme Judicial District of Texas.

4. *Previous Appearance in this Court in a Related Case.* LFA appeared as amicus curiae this term in the case of NOLLAN V. CALIFORNIA COASTAL COMMISSION, No. 86-133, which presented questions closely related to those in the case at bar.

5. *Desirability of an Amicus Curiae Brief.* The case is one of great public importance. The past involvement of this amicus curiae not only in *Nollan* but in other takings cases as well, makes it likely that amicus can assist the Court in developing the issues fully. Amicus here concentrates most heavily upon issues of public policy, and seeks to emphasize the interest of the public in the protection of the private rights involved.

6. *Avoidance of Unnecessary Duplication.* Amicus curiae has carefully reviewed the Petition for Certiorari and Appendix in an effort to avoid unnecessary duplication.

7. *Requests for Consent of Parties.* This amicus curiae timely requested consent of all parties. The consent of Petitioners Robert Matcha and Anne Morgan Matcha has been requested and received, and is submitted herewith. The Respondent has expressly refused to consent to the appearance of this amicus. The letter refusing consent is also submitted herewith. Amicus Curiae accordingly files this Motion pursuant to the Rules of this Court.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING GRANT OF THE WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements made in paragraphs 1 and 2 of the Motion preceding this brief, as showing the interest of amicus curiae.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case made by Petitioners Robert Matcha and Ann Morgan Matcha.

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), this Court stated that in identifying a "taking," it would consider the economic impact on the individual, the character of the governmental action, the necessity of the action

to promote the "health, safety, morals, or general welfare," and the extent to which the action actually serves a uniquely public function. *Id.* at 124, 125, 128.

These factors correspond to considerations underlying the just compensation requirement, including the policies of protecting the settled expectations of the parties, harmonizing competing social needs, limiting governmental excess, and insuring that the costs of benefits to society as a whole are not to be borne by a small part of society. An analysis of these factors makes clear that the decision below is in conflict with *Penn Central* and other decisions of this Court.

I. THE COSTS OF BENEFITS TO SOCIETY AS A WHOLE SHOULD NOT BE BORNE BY ONLY A SMALL PART OF SOCIETY.

The compensation-for-taking requirement is fundamentally and foremost "a limit on a government's power to isolate particular individuals for sacrifice to the general good," L. TRIBE, AMERICAN CONSTITUTIONAL LAW sec. 9-4, at 463 (1978), as has been forcefully expressed by this Court in *Armstrong v. United States*, 364 U.S. 40 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Id. at 49. The burden being borne by the affected group in *Armstrong* was the inability to enforce certain valid liens on the ground that there "was a total destruction by the Goverment of all value of these liens" which had "every possible element of a Fifth Amendment 'taking' ". *Id.* at 48. In the case at bar, a requirement that Petitioners remove their beach house and land-

scaping, and cease to enjoy their own property, constitutes a virtually total destruction of all the value of their property.[1]

The real question in such cases is not whether the result desired is a beneficial one, but "upon whom the loss of the changes should fall." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922). In making such decisions, it is important to be constantly mindful of the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.*

II. THE POLICY UNDERLYING THE JUST COMPENSATION REQUIREMENT OF LIMITING GOVERNMENTAL EXCESS WOULD BE SERVED BY APPLYING THE REQUIREMENT IN THIS CASE.

One of the policies served by the just compensation requirement is that of preventing governmental excess by causing a governmental body or agency to consider the total societal costs of a proposed action.[2] Indeed, this Court has held that the costs of the proposed action must be weighed against the necessity for the action to promote " 'the health, safety, morals, or

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1 This Court has held in other cases that takings of private property less complete than that involved in this case have been an impermissible sacrifice of private property for the public good. *See, e.g. Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980) (holding that taking the interest on funds deposited in the registry of a county court in Florida was an unconstitutional taking); *Griggs v. County of Allegheny, Pennsylvania*, 369 U.S. 84 (1962) (holding that noise from aircraft making a home at the end of the runway "unbearable" for residential use, constituted an unconstitutional taking of an air easement over the property).

2 D. Hagman, *Outline of Presentation, The Compensation Issue: Theories of Liability for Damages from Planning and Land Use Controls*, ALI-ABA Program, Arlington, Virginia (March 26, 1980).

general welfare.' " *Penn Central*, 438 U.S. at 125. If there is no need to pay for the property taken, the planner tends to focus on only the issues his perceptions cause him to be interested in, without the restraint of weighing the real costs imposed on other individuals and, indeed, on the society as a whole. As this Court has said in discussing the problems created when the right to compensation is qualified by the exercise of the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal, supra*, at 415.

This tendency to take private property without weighing the impact on the individual is especially apparent in this case, in view of the fact that the easement taken under the statute is much greater than is necessary to achieve the stated statutory purpose of preserving the public's right of ingress and egress. Tex. Nat. Res. Code Ann. sec. 61.011 (Vernon 1978). As Petitioners point out, an expert witness for the state testified at the trial below that "the various beach landmarks had recovered to their pre-Alicia location by the time of trial including the sandy beach most used by the public." Petition for a Writ of Certiorari at 10. As the expert testimony further indicates that the vegetation will gradually readjust in a seaward direction, *id.*, there is no apparent justification for requiring Petitioners to remove their improvements in the interim.

The effect of a failure to weigh the costs is seen not only in the fact that the easement being claimed is wider than before, but is also apparent from the implicit statutory indication that a 200 foot easement would be sufficient to protect the public's right of ingress and egress.[3] The statute provides that in areas where the vegetation line is not clearly marked or where it has

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3 In fact, it has been suggested that the statute is subject to an interpretation that "the two hundred foot line is always the maximum extent of the public's easement along the beach." Comment, *Public Access to Receding Beaches*, 13 Hous. L. Rev. 984, 998 (1976).

been obliterated or created artificially, a 200 foot line will be used as the final boundary or as a temporary boundary pending a final determination. Tex. Nat. Res. Code Ann. secs. 61.016 and 61.017 (Vernon 1978). Clearly the legislature considered a 200 foot easement sufficient for its purposes, yet the state is unwilling to consider either the action of a *natural* disaster such as a hurricane an obliteration or to consider Petitioner's plantings as "artificial changes in the natural vegetation of the area," Tex. Nat. Res. Code Ann. sec. 61.017 (Vernon 1978), thus giving them the benefit of the above statutory provisions.

Furthermore, the state's interpretation is not necessary for the purposes of clarity. It is probably clearer to most beachgoers that they should not interfere with a private home[4] than that they should not cross over a line of vegetation which in many instances may be poorly defined.

The danger inherent in making the taking of private property overly attractive by not requiring compensation is eloquently expressed in the following passage:

> One may applaud the idea of a need for increased public recreational areas and still observe that the assertion of public need for private property under our Constitution is an assertion that the public should pay for what it wishes to take. Devices to take private property without compensation carry no guarantee that they will be restricted to tidelands, dry sand areas or the like. The appetite for taking private property for nothing could easily extend inland from tideland areas under the same claims of public need if that is recognized as a reason for taking without compensation.

Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RES. LAW 279, 295 (1977).

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4 *See* Petition for a Writ of Certiorari at 10.

III. THE DECISION BELOW FAILS TO SERVE THE IMPORTANT PURPOSE OF HARMONIZING COMPETING SOCIAL NEEDS.

When monetary constraints are substantially removed from the decision to take private property, there is an increased likelihood that other social costs may also be overlooked. This concern also underlies the compensation requirement. *See generally* Hagman, *supra* at 2. For example, a regulatory taking may remove productive land from its best use; confusion as to the right to rely on one's ownership may make its best use improbable; and jobs, commerce and products may be lost because firms as well as individuals will fear that their interests are unprotected.

The Texas coastline is large enough to accommodate both developed and undeveloped areas, and there are advantages to both. Beach homes, condominiums, and hotels give people a place to stay while enjoying the beach. The quality of life is thereby improved for many citizens, tourism is increased, providing an important economic benefit to the state, and the public image of the state as a state of rich diversity is enhanced as more people visit and enjoy the coastline. The decision below will not, of course, result in a cessation of development of the coastline. Unfortunately, it will surely tend to discourage *quality* development, because of the risk involved in spending large sums on something that can be so capriciously taken away. Yet quality development is especially important in maximizing all the benefits just mentioned.

IV. THE DECISION BELOW DOES NOT COMPORT WITH THE SETTLED EXPECTATIONS OF THE PARTIES.

Finally, the compensation requirement furthers the policy that "certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation." Tribe, *supra* at 456. Furtherance of this policy has been supported by this Court, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Penn Central*, *supra*. These considerations should be considered

particularly relevant in this case, because the policy favoring protection of settled expectations is especially strong when the expectations are "investment-backed expectations." *Penn Central, supra,* at 124-125.

The Court in *Kaiser Aetna* further held that even though the government could have prevented the owners from making the improvements, 444 U.S. at 179, once it had acquiesced in the investment of "substantial amounts of money," *id.* at 176, its conduct had brought about "the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Id.* at 179. Likewise, the state has here acquiesced in the investments made by the Appellants, and it should not now be able arbitrarily to deny them the benefit of those investments. Implicit recognition that homeowners should be put on notice that their property could be taken away can be seen in the notice provision recently added to the Open Beaches Act, Tex. Nat. Res. Code Ann. sec. 61.025 (Vernon Supp. 1986). The provision underscores the importance of making purchasers of property aware in advance of limitations on its use, but it comes too late to help Petitioners herein.

The effect of unpredictable property rules is illustrated by the following analysis of a similar problem in New Jersey:

> Title insurance specialists estimate that between 50,000 and 60,000 individual property owners could be affected if the state chooses to claim title to their land via [the New Jersey decision in] *Sisselman.* The aftermath of the decision could be mildly described as tremendous. The development of the meadowlands has come to an abrupt halt. Companies which were planning extensions of million-dollar plants in the meadowlands can no longer secure title insurance policies. Municipal government revenues are threatened because the taxability of the meadowlands is

> questionable. And residential property owners have been left wondering whether they own the land upon which they have been paying taxes and upon which they have made valuable improvements. One writer described the situation succinctly when he said: "The status is most depressing."

Note, *Tideland Ownership—Time for Reform*, 36 U. Cin. L. Rev. 121, 121 n.4 (1967).

The Petitioners' expectations have been bolstered by the prior decisions in this area. The Supreme Court of Texas made it clear in *Luttes v. State*, 324 S.W.2d 167 (Tex. 1958), that it is necessary to look at "averages over a period of years" in defining property rights in the coastline. *Id.* at 180. The Houston Court of Appeals in *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.), based its decision in important part on the assumption that the vegetation line was stable and had been for at least 200 years, *id.* at 931, and that while there may be "particularly from storms, some erosion on the beach and at points on the vegetation line, such is temporary and the beach and the line of vegetation through the work of nature rebuild in relatively short times." *Id.* Likewise, the Corpus Christi Court of Appeals justified its decision to recognize a public easement in *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App.—Corpus Christi 1979) partly by the "considerable testimony in the record which establishes the stability of the beach in question." *Id.* at 379.

The rolling easement concept is certainly far from an established doctrine, and is in fact presented in the Houston Law Review article previously cited as a "proposed solution" to the problem of a receding shoreline, 13 HOUS. L. REV. at 1006, one lacking "higher court precedent," *id.* at 1008, but whose "time has come." *Id.* Amicus submits that adopting such a "solution" by sacrificing the investment-backed expectations of the property owners in this case is a violation of the compensation clause of the United States Constitution.

CONCLUSION

These considerations should protect the individual property interests at issue in this case. They reinforce the conclusion that an interpretation of the Open Beaches Act that would destroy those interests would infringe the Constitution. At the very least, these policy considerations raise a "substantial" constitutional question, which should be addressed by this Court. Consequently, the Writ of Certiorari should be granted.

Respectfully submitted,

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